UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Case No. 05-44481
DELPHI CORPORATION, et al,	:	
	:	One Bowling Green
	:	New York, NY
Debtors.	:	January 5, 2006

TRANSCRIPT OF OMNIBUS HEARING
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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(Appearances continued on next page)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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(Appearances continued on next page)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: Please be seated. Okay. Good morning. Delphi Corporation.

MR. BUTLER: Good morning, Your Honor. Jack Butler, Kevin Murphy, David Springer and Tom Matz here today on behalf of Delphi Corporation for its January omnibus hearing.

Your Honor, we have filed a proposed third omnibus hearing agenda. It has been served in accordance with the case management order and has been posted on Delphidocket.com, and it is the agenda we'd like to use today if that's acceptable to the Court.

THE COURT: That's fine.

MR. BUTLER: Your Honor, the first matter on the agenda under the continued or adjourned matters is the interim -- what's remaining of the interim compensation motion at Docket No. 11. The remaining item deals with the appointment of a fee committee in these cases.

The first fee statements in these cases were submitted at the end of last week. There is a meet and confer that is planned to occur during the month of January between the creditors committee, the debtor and the U.S. Trustee. The U.S. Trustee did file an objection to the appointment of a fee committee in these cases arguing that it may not be warranted.

We've agreed with the U.S. Trustee to adjourn this matter to the February 9th hearing and try to work out a process for the appointment of a committee between now and then. The debtors believe a committee ought to be appointed in

these cases, and absent being able to resolve any issues during the meet and confer, our intention would be to proceed with the motion at the February 9th omnibus hearing.

THE COURT: Okay. That's fine. I -- I mean, these are obviously large cases, and as evidenced by the number of people in the courtroom, they attract a lot of lawyers, appropriately, and my experience has been that it is worthwhile to have some specific oversight over fees involving the U.S. Trustee, sophisticated consumers of legal services on a creditors committee and the debtors.

And I think the only real issue is the cost of involving a third party in that process and generally, my experience with regard to such third parties is that they provide some benefit because they have their computer programs where they check billing records but that they don't have the type of sophistication necessarily that the other parties do.

So maybe there's a way to split the issue along those lines.

MR. BUTLER: Your Honor, the -- two co-fiduciaries and the trustee have I think some constructive conversations about this, and they have agreed to meet to try to resolve this, and I would -- I'm reasonably optimistic that there will be a resolution.

THE COURT: Okay. Thank you.

MR. BUTLER: Your Honor, the second matter on the agenda, Agenda Item No. 2 is the KECP motion. This is Docket

No. 213. There had been a previous agreement to adjourn the motion to the January 27th specially set hearing.

We have been engaged for the last month or so in a dialogue with the creditors committee who has engaged a separate compensation consultant to review the KECP program and to work with our compensation consultant. In fact, there's a meeting scheduled between the compensation consultants for tomorrow to continue to work on the structure, scope and other details relating to the program.

In the course of those discussions between the creditors committee and the company, we would -- had agreed that the January 27th hearing ought to be very narrowly focused on the annual incentive program for the period end of June 30th of this year, and that the balance of the motion which would involve the annual incentive plans beyond June 30th and the proposed cash equity incentive emergency awards, the debtors are prepared to adjourn that to the July 2006 omnibus hearing, and we've extended the objection deadline for the creditors committee.

All the other objection deadlines have passed in this case, but we want to be able to continue to work with the committee and their compensation consultants. The goal here between the company and the committee is to arrive at a program that is mutually acceptable to the two -- to at least the debtors and creditors committee and then hopefully we can resolve the remaining objections that have been filed.

THE COURT: Okay. Obviously, the motion as originally filed was a lightning rod, and I just want to make sure that you've given notice to the objectants that the only thing that's currently contemplated to go forward at the next hearing is that limited portion of the motion. So --

MR. BUTLER: We have --

THE COURT: -- ~~continue~~ they won=t show up to argue the whole thing.

MR. BUTLER: Your Honor, we have communicated with each of the objectors. We also have posted that information on Delphidocket.com generally, and so that information is there.

We understand that there -- you know, there are I think ten or so objections that have been filed in connection with the program, and I'll not address the merits of the motion at this point.

THE COURT: No, that's fine. Okay. Thank you.

MR. BUTLER: Your Honor, the next set of matters are matters that I think Mr. Berger is going to address.

MR. BERGER: Good morning, Judge. Neil Burger, Togut Segal for the debtors.

We have a number of matters in sequence on the calendar. Number Three is Specmo Enterprises. This is a demand by Specmo to set off -- they assert that Delphi owes Specmo a little more than half a million dollars and that there's a reciprocal claim of more than $350,000. Debtors have completed the reconciliation of these competing claims. They

forwarded it to Specmo's counsel who has forwarded it to his business folks, and we're hopeful that before the next omnibus hearing date, this matter will be settled.

So, with Your Honor's consent, this matter should be adjourned to February 9th.

THE COURT: Okay. That's fine.

MR. BERGER: Thank you, Judge.

The next matter is Schmidt Technology. This is an order to show cause that the debtors sought and had entered by Your Honor, Docket No. 477, and the order to show cause directs Schmidt to show cause why it should not be held to have violated the automatic stay for having demanded and obtained a post-petition payment on account of pre-petition obligations.

There is a constant and open dialogue and exchange of information between the parties on this matter, Your Honor. Schmidt is asserting that it is a foreign vendor, foreign creditor under Your Honor's prior order and is seeking that status.

We're nearing completion of informal discovery and legal research, and again, we're hopeful that this matter as well will be settled. If not, we'll report back to Your Honor on February 9.

THE COURT: Okay.

MR. BERGER: DBM Technologies, Number 5 on the agenda like Specmo is a setoff demand. The debtors have completed their reconciliation of the competing claims. We've sent it

off to DBM's counsel in Detroit. They've shared it with their client. I would expect in the next week or so this matter will be settled, and as the agenda reflects, we'd like to have this matter adjourned to the February 9 date.

THE COURT: That's fine.

MR. BERGER: JST Manufacturing -- I'm sorry, Entergy, Number 6, Entergy filed a motion for authority to set off or recoup against a six-hundred-thousand-dollar payment that it obtained within ninety days prior to the petition date.

The debtors filed a response last week, Docket No. 1662. Entergy has expressed a desire to file a response. There are factual issues in play. We have agreed that they could file a response. It would be filed on or before a week from tomorrow.

We'll look at that response. If there are factual issues, there may be some discovery, but in the interim, Your Honor, we'd like to adjourn this to February 9.

THE COURT: Okay.

MR. BERGER: JST Manufacturing is Number 7. It's an order to show cause, again, seeking -- directing JST to show cause why it should not be held to have violated the automatic stay for having received a post-petition payment on account of pre-petition obligations.

As I understand it, JST is a small Japanese enterprise and, in the beginning, there may have been some language barrier. Most recently, JST has asserted that they

should be treated as a foreign vendor, and perhaps more significantly, they've asserted a financial inability to respond to this order to show cause by having to disgorge the funds.

They had promised me expect within the week documents concerning their corporate structure to go to the issue of whether or not they're a foreign vendor and also some financial information to see whether or not we're chasing something that simply won't happen.

THE COURT: Okay.

MR. BERGER: This matter should be adjourned as we requested in the agenda to the February 9 hearing.

THE COURT: All right.

MR. BERGER: And that's a break for my matters for the moment.

THE COURT: Okay.

MR. BUTLER: Your Honor, Number 8 on the agenda is the Pullman Bank and Trust Company motion. Pullman alleges the debtors have failed to make certain post-petition payments on leases held by the bank, and therefore, the bank moved for various relief under the motion.

Your Honor, the debtors have disputed with Pullman that those assertions are accurate. The debtors believe they have made -- they're in full compliance with the leases, and the parties have agreed to try to reconcile the underlying factual record here and try and sort out any remaining

disputes, and therefore, would request that this matter be put off to the February 9th omnibus hearing.

THE COURT: Okay.

MR. BUTLER: Mr. Berger?

MR. BERGER: Next on the calendar, Your Honor -- excuse me, Neil Berger for the debtors.

Number 9, Furukawa Electric North America. This is a motion by Furukawa for authority to set off against a payment of approximately $2.3 million that it received on October 4, 2005.

This motion was filed just before the holidays, Your Honor. Our client needs a little bit of time and an opportunity to look at the facts, and we requested and Furukawa consented to request Your Honor adjourn this matter to the February 9 date.

THE COURT: Okay.

MR. BUTLER: Your Honor, Matter No. 10 on the agenda is a case management amendment motion filed with Docket No. 1556 filed by the creditors committee which the committee seeks to amend various aspects of case management in these Chapter 11 cases.

The United States Trustee, the creditors committee and the debtors have agreed to a meet and confer on this matter to try and sort out what procedural changes, if any, we can all consensually agree to and then recommend to the Court for the Court's consideration. Otherwise, we'll file responses and the

matter would be heard at the February 9th hearing.

THE COURT: Okay.

MR. BUTLER: That's -- that's the status.

THE COURT: All right. There was a similar modification I guess in the Refco case that I'm pretty comfortable with, and your colleagues in that case were too. So maybe that can be a model.

I mean, it wasn't major, but it just streamlined things a bit vis-a-vis the committee.

MR. BUTLER: Thank you, Your Honor.

Your Honor, Matter No. 11 on the agenda is a motion filed by Appaloosa Management, LP asking this Court to appoint an equity committee in the Chapter 11 case that's filed in Docket No. 1604.

This motion was filed while the United States Trustee had a similar request from Appaloosa under its consideration and had not reached a determination. The debtors asked Appaloosa if they would put this matter off for a few weeks. Appaloosa had sought some extensive discovery and we've got issues relating to the discovery they wanted to put in place.

The debtors also believed it was appropriate for the schedules of -- the schedules and the statements to be filed in these cases. They will be filed in accordance with Your Honor's order by January 22nd, and the 341 meeting in these cases is being conducted by the United States Trustee I believe on February 3rd.

Our agreement with the -- with Appaloosa is to ask for a date not earlier than January 30th, 2006 for this matter to be heard. I'm advised by Appaloosa that they have a scheduling conflict with the February 9th hearing, and they asked for a special setting sometime after January 30th, but as soon thereafter as Your Honor could find time.

We're certainly prepared to -- we've talked with chambers, we're prepared to, you know, continue to consult in trying to find a mutually acceptable date if that's acceptable, Your Honor.

THE COURT: Okay. Sometime in February.

MR. BUTLER: I think Mr. Berger has I think the next set of matters.

MR. BERGER: Judge, Neil Berger for the debtors. Moving into the uncontested and settled matters, Number 12, the Lee Company, this was an order to show cause Your Honor issued concerning a fifty-eight-thousand-dollar payment that Lee obtained post-petition on account on pre-petition obligations. Lee is a supplier to the debtor, and this matter has been settled, and I have an order that I'll hand up in just a moment.

The significant elements of the settlement is that Lee will continue to ship to the debtor. The debtor will move separately to assume this agreement. The $58,000 will be applied toward cure obligations on the assumption. To the extent that cure obligations don't consume the full $58,000,

the balance will be applied solely to the post-petition obligations of the debtor.

So the harm has been completely remedied.

THE COURT: Okay.

MR. BERGER: The next matter --

THE COURT: That's -- I'll approve that.

MR. BERGER: I'm sorry. Thank you, Judge.

The next matter, Number 13 is Proto Manufacturing, also an order to show cause, challenged a three-hundred-and-forty-thousand-dollar payment that Proto obtained post-petition on account of pre-petition obligations. This matter has also been resolved, Your Honor.

Proto has agreed that the full amount of the transfers will be credited solely to post-petition obligations and barring anyone here in court today or questions from Your Honor, we'd ask that Your Honor approve that one as well.

THE COURT: I'll approve that.

MR. BERGER: Your Honor, I have orders -- I believe they're --

THE COURT: Why don't you leave them up with chambers.

MR. BERGER: I'll do that, Judge. Thank you.

MR. BUTLER: Matter No. 14 on the agenda at Docket No. 997 is the debtors' motion authorizing debtors to obtain preferential power rights pursuant to a letter agreement with Niagara Mohawk Power Corporation and to assume that agreement.

Your Honor may recall that we adjourned this from a prior hearing in order to give an opportunity for the New York Power Authority Board of Trustees to consider this matter which occurred on December 13th, and on that date, the New York Power Authority Board of Trustees approved the various transactions needed to implement the agreement that's before Your Honor.

Simply stated, Your Honor, if the Court approves this transaction and allows us to consummate it, we would be able to obtain valuable low-cost electricity at significantly discounted rates for the duration of the power contracts.

That assumption will save according to the debtors' estimate approximately $50,000 a month over the terms of the contracts, and the -- and the term of the contracts range from ten months to as long as seven years from today's date.

We've reviewed this matter with the creditors committee. No objections have been filed. Unless Your Honor wants additional information, we'd ask --

THE COURT: I just -- this is not really an assumption ~~of the~~under 365 because the debtors weren't really a party to these contracts, right? They're basically being substituted in for --

MR. BUTLER: There's going to be an assignment and then we're assuming the contract --

THE COURT: Okay. All right. And that's why you're paying the extra money --

MR. BUTLER: Correct, Your Honor.

THE COURT: Okay. I'll approve it. It's clearly a good deal.

MR. BUTLER: Thank you, Your Honor.

Your Honor, Matter No. 15 on the agenda is the application of the creditors committee for the appointment of Latham and Watkins as counsel on Docket No. 1086. This has been adjourned to allow the debtors an opportunity to complete their review of the application.

We have done so. The debtors support the retention application and we have no other further comments.

THE COURT: Okay. I've reviewed it and I will approve the retention.

MR. BUTLER: Your Honor, just taking a clue off your conversation with Mr. Berger, do you want us to submit all the orders to chambers after the hearing?

THE COURT: Yes, that's fine. And on ~~the~~ that subject, ~~where~~ while I'm normally happy to have proposed orders ~~proposed order~~ emailed to chambers, ~~but~~ when we have a big omnibus day, it's probably better to just bring them on a disc to chambers, particularly since Ms. ~~Lee~~ Li has been out.~~, and i~~ It's just easier to have the disc.

MR. BUTLER: Thank you. And we have discs with us today, Your Honor.

THE COURT: Okay. Thanks.

MR. BUTLER: Mr. Berger, I think the next is yours.

MR. BERGER: Neil Berger for the debtors.

Your Honor, Number 16 on the calendar is AMR Industries, an order to show cause, Docket No. 1090. This is another order to show cause that the debtors ask to be entered to challenge a small payment of about $6,600 made to AMR post-petition on account of what was believed to have been all pre-petition obligations.

JST -- I'm sorry, AMR asserted that not all of the funds were intended to satisfy pre-petition obligations. After some informal discovery and some diligence, the debtors and we concluded that this creditor was right. Only about $2,100 was on account of pre-petition obligations. The matter has been settled, and we have an order to drop off in chambers pursuant to which the $2,100 will be returned to the debtors on or before January 13th. The balance is to pre-petition obligations.

While this is a small amount, it should reflect the debtors' commitment to the continued integrity of the order to show cause process that Your Honor put in place and has been effectively enforced.

THE COURT: Okay. I'll approve that.

MR. BERGER: Thank you, Judge.

Number 17 is Pepco Energy Services. Pepco filed a motion for relief from the automatic stay. Pepco and the debtors are parties to a sales agreement, pursuant to which energy utility services provided to the debtors' New Brunswick, New Jersey manufacturing facility where approximately 425

people are employed, it's an important component of our manufacturing structure.

The relief from stay sought three alternative forms of relief. The first was relief from the stay to serve a termination notice to terminate the sales agreement and potentially the utility service. Alternatively, they sought to compel the debtors to assume or reject the agreement.

Pepco -- the debtors filed a response and Pepco was -- without prejudice the two branches of their motion seeking relief from the automatic stay and the -- an order compelling the debtors to assume or reject.

What was left open, Your Honor, was finding some type of mechanism so that the debtor would be protected. They have significant property interests in this facility, and also Pepco's desire to be protected apparently under certain regulations that they don't serve a termination notice by a date certain late in the month. They're required to provide the utility service through the next billing period whether or not the debtors pay.

We have the framework of a settlement that we reached yesterday, the significant portions of which I can report to the Court are that Pepco has agreed to email invoices to a dedicated email address so that we can be certain to get invoices to the right person on time. The debtors retain their contractual period to pay and to cure any defaults.

And Pepco would have the opportunity to seek relief

from the automatic stay. The concern was that we didn't want to have a utility provider terminating service without coming before the Court on notice to the appropriate parties.

They'd be able to seek entry of an order modifying the stay to serve a termination notice on three business days' notice, and that would have to be emailed or faxed to us, and what that does, Your Honor, is that it gives the debtors an opportunity to come back to the Court in case there's some type of dispute about the default that Pepco is concerned about.

So, having said all that, Your Honor, I think we've resolved all the issues in this motion. We're protecting the debtors' interest. We're ensuring that Pepco gets paid on time.

THE COURT: Okay. So you're going to submit an agreed order later this month or --

MR. BERGER: Hopefully, within the week, we'll have a stipulation to submit to Your Honor.

THE COURT: Okay.

MR. BUTLER: Your Honor, the other matters on the agenda we'd like to take together, Matters No. 18 and 19 and 20 on the agenda.

Matters 18 -- Matter 18 is the application of the creditors committee for the retention of Warner Stevens, LLP as conflicts counsel found at Docket No. 1170.

Matter 19 is the application of the committee to retain Mesirow Financial Consulting, LLC as financial advisors

to the committee and that is at Docket No. 1335.

And Matter No. 20 is the application of the committee to retain Steven Hall as compensation consultants. That's at Docket No. 1399.

Taking Matter 20 first, there is an open issue that the committee and the U.S. Trustee are working out relating to an indemnity matter, and we're not prepared to present an order today to Your Honor but the request would be to have this carried to the February 9th omnibus hearing, but the expectation would be that there would be a consent order submitted between -- before that time between the U.S. Trustee and the creditors committee --

THE COURT: This is Steven Hall and Partners?

MR. BUTLER: This would be -- yeah, Number 20, correct.

THE COURT: Okay. All right. That's fine.

MR. BUTLER: As to Matter 18 and 19, Your Honor, there have been no objections filed. The debtors have reviewed these papers as well in support the motions of the creditors committee. There has been an amended order in Matter No. 18 in Warner Stevens to simply make the conflicts counsel retention mirror the same -- the debtors' order appears and so there's an amended order in that respect.

THE COURT: Okay. All right. I reviewed these applications including the supplemental affidavit by Mesirow regarding their screening procedures and I'm comfortable that

they'll live up to those procedures, that they're disinterested.

So I'll approve both of those retentions.

MR. BUTLER: Your Honor, I should also point out just so that there's a record on this. These applications are nunc pro tunc to the actual retention date for each of the individual firms and the debtors support that.

THE COURT: Right. And I -- given the review process that they've undergone that nunc pro tunc retention is appropriate.

MR. BUTLER: Thank you, Your Honor.

Your Honor, Matter No. 21 is a procedural matter. Umicore Autocat Canada Corporation has filed a motion to substitute an exhibit that was attached to their file notice of reformation demand. They filed the motion in Docket No. 1543.

Umicore does not wish to change its substantive material but to submit a redacted version of the exhibit contained in the file and published to the ECF in order to protect the information.

We've reviewed the exhibit. We have no issue with the matter at all, and so we don't oppose the motion and are comfortable with the relief requested.

THE COURT: And it provides for the pulling of the current exhibit?

MR. BUTLER: Yes, Your Honor.

THE COURT: Okay. All right. Hearing no opposition,

I'll approve that.

MR. BUTLER: Thank you, Your Honor.

Your Honor, the next matter before the Court is the debtors' first exclusivity motion seeking an extension of time to file and solicit acceptances and solicit acceptance of the plan of reorganization that's filed at Docket No. 1549.

Your Honor, the debtors publicly disclosed at the outset of these cases that our strategic organization timetable targeted emergence from Chapter 11 sometime in the first half of 2007, about fourteen to sixteen months beyond the current period of exclusivity and the debtor has, in fact, had discussions with the creditors committee about having a lengthy extension of the exclusivity period to mirror that timetable.

In -- we believed that it was most important in this first extension even though the Court and I think other parties should know that we'll be coming back. We thought it was most important if we could to have a consensual path and framework with the creditors committee and with other major stakeholders, and we have therefore agreed with the committee that the initial extension should be from February 6th, 2006 to -- and April 7, 2006 to August 5, 2006 and October 4, 2006, respectively and without prejudice of our rights to seek further extension.

So the time for filing a plan would go from February 6th to August 5th, and the solicit would go from April 7th to October 4th. These periods would apply to all the debtors

including the debtors that filed a few days later than -- the three debtors that filed a few days later than the majority that filed on October 8th.

And we have obtained the concurrence of the dip lenders and the pre-petition administrative agent as well to that timetable, and that's what we're here before the Court to ask today.

THE COURT: Okay. Does anyone want to address this motion?

All right. Hearing no one and noting that there are no objections, I'll approve it. I assume you will be coming back, but I think it's -- it's worthwhile to have to come back, you know, in a case like this.

MR. BUTLER: Thank you, Your Honor.

Your Honor, the Matter No. 23 is a procedures motion. It is a motion asking for authority to approve procedures for rejecting unexpired real property lease and authorizing the debtors to abandon certain furniture, fixture and equipment.

This lease rejection procedures motion was filed at Docket No. 1551.

As part of the debtors' restructuring efforts, the debtors were undertaking a comprehensive evaluation of the economic value of their unexpired non-residential real property leases and we've indicated to parties of interest in the court from the first day of these cases that one of the debtors' principal goals in filing these Chapter 11 cases was to achieve

competitiveness by realigning Delphi's global product portfolio and manufacturing footprint.

And, in doing so, we may need to reject certain leases. There's only one objection that was filed to this motion. It was an objection by an entity called Orix Warren. They agreed to -- they objected to certain of the notice procedures and sought an administrative expense claim in connection with abandonment matters.

We've resolved those -- that objection and have agreed that any notice of rejection that relates to the lease for 455 One Research Parkway in Warren, Ohio would be served in a specific manner as set forth in the revised order, and we also agreed that -- to certain other relief with respect to Orix Warren including how we would deal with certain of the property and the reservation of rights with respect to abandonment.

Your Honor, General Electric Capital Corporation also informally raised concerns about the application of this order to General Electric's equipment lease, but this procedure are not intended to address anything other than non-residential real property leases, and we resolved GE's concern by including language that made it specific that these -- this -- these procedures do not apply to General Electric.

We also agreed to the creditors committee request that Saturdays and Sundays be excluded in determining the ten-day notice period related to giving notice to the committee,

for example, under the -- the notice provisions, and we agreed to that, and that language has also been put in the order.

So, without going through all the procedures, Your Honor, essentially this process allows us to rationalize our real estate portfolio by giving notices to the -- to the directly interested parties and the committee and the U.S. Trustee in going through a process. If no one has a problem with that, we don't need to keep coming back to court.

THE COURT: Okay. Who did -- did you serve all the real property lessors --

MR. BUTLER: Yes.

THE COURT: You did. Okay. All right. And, as I read it, it really is a notice procedure, primarily, and then obviously it imposes certain results on those who don't object. If you do object, the issues are to be resolved by me.

MR. BUTLER: That's correct, Your Honor.

THE COURT: Okay. All right. Based on that, understanding that again there ~~being~~ are no objections, ~~I'll accept~~ except the ones you resolved~~.~~, I'll approve it.

MR. BUTLER: Thank you, Your Honor.

Your Honor, the next matter on the agenda is Matter No. 24. This is our motion seeking authority to assume an executory contract with Pillarhouse USA found at Docket No. 1553, and Your Honor, this is directly related to the decision Your Honor made at the last omnibus hearing which set a time to assume or reject, and the net result if Your Honor approves

means that in addition to being paid the post-petition equipment installation charge of $3,950, Pillarhouse will also receive the pre-petition equipment costs payment of 73,594.60.

THE COURT: Okay. All right. I reviewed the motion, and, obviously, ~~they~~ Pillarhouse was~~were~~ necessary. So I'll approve it.

MR. BUTLER: Thank you, Your Honor.

Your Honor, Matter No. 25, another procedural motion. This is a motion to extend the time within which the debtors may remove actions, and we're seeking an order extending by an additional ninety days the period during which the debtors may remove actions under 28 U.S.C. 1452 and Bankruptcy Rule 9027.

We're asking the Court to enter an order that would authorize us to remove actions pending on the petition date to the later of April 6th, 2006 or thirty days after entry of an order terminating the automatic stay with respect to any particular action that's sought to be removed.

The order also provides that this is without prejudice to us seeking further extensions of the period, and Your Honor, we actually planned to seek further extensions of the period.

This first extension was for a short period of time that would not prejudice all the parties. It was done on an expedited notice procedure in that not every party to every piece of litigation received notice of this because as we're preparing the schedules and the statements and so forth, trying

to put all that together has been sort of a massive undertaking, and we believe that there was -- there would be no prejudice to having a brief extension by serving the master service list, the 2002 list and otherwise, providing that type of notice.

We will, at least, when we seek a longer extension in connection with some 200 or more judicial and administrative proceedings currently pending across the United States, we will in connection with a longer extension serve each of the litigation parties as we move forward, but I did want Your Honor to understand that the notice procedure for this particular matter, which is why we've limited the request for the extension to ninety days.

THE COURT: But you did serve the 2002 list?

MR. BUTLER: We did, Your Honor. Anyone who has sought notice in this case has gotten notice --

THE COURT: Right. And I didn't see any objections.

MR. BUTLER: There have been no objections filed.

THE COURT: Okay. I'll approve this in light of the number of litigations that the debtors have to consider.

MR. BUTLER: Thank you, Your Honor.

Your Honor, Matter No. 26 on the agenda, again, another procedural motion. This is a lease renewal motion found at Docket No. 1555, and just as, Your Honor, there may be leases that we don't want to stick with, there also are leases that we may want to renew and continue to move forward in.

And without getting into the issue of whether this is ordinary course or not ordinary course, we thought that the better procedure here was to work out a settlement procedure with the creditors committee on how we would deal with lease renewals. The guidelines are set forth in the proposed order. There have been no objections filed by any party, and this will eliminate any doubt about how we'll deal with real property assets of the estate.

THE COURT: Okay. I had one comment here which is that Paragraph 3 which says that for lease obligations of 200,000 or less per annum or one million in the aggregate wouldn't apply to leases with insiders and that that would be covered by Paragraph 4.

MR. BUTLER: Yeah. I --

THE COURT: I don't know if there are any, but I just -- you know, I'd rather you give notice to the notice parties in Paragraph 4 if you're going to be --

MR. BUTLER: Not an issue, Your Honor.

THE COURT: Okay.

MR. BUTLER: I don't think any of these are insider leases, but I understand the comment.

THE COURT: Okay.

MR. BUTLER: Is the motion otherwise acceptable?

THE COURT: Yes, otherwise, it's granted -- yes, it's granted.

MR. BUTLER: Thank you, Your Honor.

Your Honor, Matter No. 27 is the debtors' insurance renewal motion. This is a motion authorizing the renewal of insurance coverage and certain related relief found at Docket No. 1559. We are seeking an order among other matters that would authorize but not direct us to renew or enter into new insurance policies with ACE American Insurance Company and affiliates and execute and deliver related documents and agreements.

This is a fairly complex motion, Your Honor, but the long and the short of it is that we have a tiered insurance program at Delphi, which provides a significant amount of coverage for general liability, products liability, automotive liability and workers compensation claims, and ACE is the foundation of that tier. So the excess layers don't operate without having that tier in place, the -- what I'll call the foundation tier involving ACE.

ACE has asked us to assume the agreements with them and to assume the obligations with them and particularly as it relates to workman's compensation matters because there's a self-insured aspect of that program. There's a collateral pool that we provide them that needs to be updated. They have cash. They'd like a letter of credit for some of those matters.

And the way I sort of boil this down is that when you -- if you approve this transaction when the dust clears, we'll provide them with an additional approximately $10 million in additional collateral to protect workman's compensation

arrangements primarily as we replace cash funds with letters of credit and give them additional letters of credit.

And, because of our obligations under the way the insurance policies work, there are actuaries that sort of assume -- you know, estimate what the actual liability will be under these programs and depending upon what degree of conference you want to have and what the ranges are, we understand from the actuaries that have given advice to our insurance agents and to our insurance risk management group that if things did not go well in the risk pool, we might by assuming this policy have as much as three or four, five million dollars of additional exposure on a worst-case basis as -- at least as AON has given advice to the company through its agents.

And the long and the short of this from the company's perspective, and I can go through each aspect of this policy, but we have reviewed it with the creditors committee. No objection has been filed. It's very important that we keep our general liability, products liability, automotive liability, and workman's comp programs in place, and we need to have the foundation tier in place.

ACE had given us a brief nine-day extension to move forward with this policy. Originally, when the case was filed, ACE had indicated they were not prepared to renew. We got them to go to the end of December and then again to go into the new year because we wanted to take some time to put this program

together, explain it to the committee, go through the due diligence necessary in connection with this.

ACE cooperated and gave us a short-term extension so we could bring this matter before the Court today.

THE COURT: Okay. So am I right then that although there may be additional liabilities under the agreement as the claims are actually processed and dealt with, there's no other cure liability per se. It's just there may be additional liabilities under the agreement?

MR. BUTLER: That's correct, Your Honor. What happens we're adding about -- I'm rounding, but we're adding about $10 million more collateral to the pool right now.

My understanding is that under a worst-case scenario that if things didn't work out in terms of pre-petition periods, that collateral pool could be exhausted and we may have an exposure also on this record of additional 5 million. I'm told it's slightly less, and they told me it's worst case, but that's the estimates that -- and that's all based on estimates from AON. I mean, you know, these are all estimates, Your Honor. The actual facts can change, but that's the -- that's the anticipation.

So the "cure claim" if you think about it from a cure claim perspective in a worst-case scenario we're estimating could be approximately 3.1 million, but that's -- there's a series of assumptions that go there, and it is nothing more than an assessment. It's not a --

THE COURT: ~~There~~ These would be fixed as the contracts play out and as they would normally.

MR. BUTLER: Correct, Your Honor.

THE COURT: Okay. All right. Again, I had one small comment on this other than wanting to have you answer that question, which is Paragraph 3 of the order says the debtors are authorized to renew or enter into insurance policies going forward, and I understand that that was something that the insurers wanted in the agreement, and I don't have any problem with that if it's in the ordinary course, and I think it's really a truism anyway, but, you know, if entering into a new policy meant, you know, incurring a large obligation for something that alters this agreement for pre-petition activity or something like that, I'd be uncomfortable.

So I think putting it in the ordinary course of their business is appropriate here.

MR. BUTLER: We'll add that, Your Honor.

THE COURT: Okay. All right. Other than that change, I approve the motion.

MR. BUTLER: Thank you, Your Honor.

THE COURT: So there's no coverage gap then, right?

MR. BUTLER: No.

THE COURT: The extension goes through the --

MR. BUTLER: Yes. We'll be able to put this in place Your Honor, and meet the requirements that ACE has imposed.

THE COURT: Okay.

MR. BUTLER: Mr. Berger has the next matter, Your Honor.

MR. BERGER: Neil Berger for the debtors, Judge.

Number 28 is Constellation Newenergy. This is an unopposed motion by Constellation Newenergy for relief from the automatic stay to set off against a two-hundred-fifty-thousand-dollar prepayment that it received pre-petition.

This is in contract to the Entergy matter that I mentioned earlier, Your Honor. In that situation, the debtors' understanding is that Entergy obtained a deposit within ninety days prior to the petition date. Having looked at the Constellation agreement, we have determined and now agree with Constellation, this was a contractually required prepayment. So --

THE COURT: That~~'s~~ explosion your hear is just people working on a subway spur.

MR. BERGER: This may not even have been ready or actually ripe for set off. I suppose they did it for prophylactic reasons. We have no objection. We've discussed the matter with counsel for the committee, and we have an agreed-upon order that we'll hand into chambers.

THE COURT: Which -- which basically lets them set off?

MR. BERGER: Correct, Judge.

THE COURT: Okay. All right. I'll approve that subject to reviewing the order.

MR. BERGER: Thank you.

THE COURT: Okay.

MR. BUTLER: Your Honor, the next matter on the agenda, Matter No. 29 is a reclamation deadline extension motion that we filed at Docket No. 1616.

The relief we're seeking is very limited, Your Honor, and that is we're asking the Court to amend the reclamation procedures order and provide that the time by which the debtors are required to submit statements of reclamation as set forth in Paragraph 2(b)(i) of the amended final order be extended by an additional forty-five days.

The other procedures remain unchanged, and importantly, as Your Honor may recall, once we've gone through a reconciliation process and we're prepared to have a view as to 75 percent or more of the reclamation claims that have been filed, we have an obligation to deliver the creditors committee a detailed reclamation report that provides the company's assessment of that, and prior to their allowance of any claims, there's -- there is a process that occurs between the debtors and the committee.

All that's unchanged, but as we've gone through to try to make assessments of over a hundred thousand different line items in the claims that have been provided, we found that we just need additional time.

So we're asking for an extension of forty-five days to send out the initial statements. The order provides for a

forty-five-day extension. I'd like to actually put a date certain in, which I would propose to be February 21st, 2006.

THE COURT: Okay. And I didn't see any objections to this.

MR. BUTLER: There have been no objections filed, Your Honor.

THE COURT: All right. I will approve it with that date.

MR. BUTLER: Thank you, Your Honor.

Your Honor, the next matter, Matter No. 30 is the final hearing on the claims trading motion and my partner, Mr. Springer will present that matter.

MR. SPRINGER: Good morning, Your Honor. David Springer for the debtors.

Your Honor, the next matter on the agenda is the debtors' motion for an order establishing notification and hearing procedures for trading and claims and equity securities. We refer to this as the "final trading order."

Briefly, on October 8th, 2005, the debtors filed a motion to establish notification procedures and to approve restrictions on certain transfers of claims against an equity interest in the debtors in order to preserve the debtors net operating loss carry forwards and certain other valuable tax attributes.

On October 11th, 2005 at the first-day hearings, certain investment banks objected to the motion, and then the

next day on October 12th after discussion with the objecting parties, the debtors agreed to revise the order, and the Court entered the order on an interim basis, and we refer to that October 12th order as the interim order.

Notice of the interim order was served upon virtually every creditor and equity holder of the debtors, and it was also published in each of The New York Times and The Wall Street Journal.

Subsequently, two parties, Appaloosa Management, LP and DC Capital Partners, LP filed objections to the interim order and several other parties including the creditors committee lodged informal objections or contacted the debtors to discuss the terms of the order and to voice their concerns or questions.

The debtors engaged in extensive negotiations with all these parties and developed a revised trading order to resolve those objections and comments, and then just before Christmas on October -- on December 23rd, 2005, we served notice of a proposed final order which the debtors believe reflected resolutions of various objections while preserving an asset of the debtors, the tax value of which could exceed $1 billion.

Last week, Wilmington Trust lodged an objection to the proposed final trading order, and over the past few days, we've made additional changes to address Wilmington Trust and others' concern, and we believe that all of the objections and

the concerns have now been resolved.

THE COURT: Can I interrupt you. Who did you serve notice of the proposed final order on?

MR. SPRINGER: It was the -- the master service list --

THE COURT: Okay. It wasn't just the objectants and the informal objectants.

MR. SPRINGER: No. No, that's right, Your Honor.

THE COURT: Okay. All right.

MR. SPRINGER: Accordingly, the debtors believe that all the objections and informal concerns that have been raised with regard to the final trading order have been resolved. I understand that counsel for Appaloosa Management, DC Capital Partners and Wilmington Trust are all present in the courtroom this morning and can confirm that their concerns have been addressed and that their objections are now withdrawn.

Silence being consent, Your Honor?

THE COURT: Well, I see people nodding. Maybe they want to say something.

MS. FAINMAN: Good afternoon, Your Honor. I'm Jessica Fainman from Schulte, Roth, and Zabel representing DC Capital Partners, and we are withdrawing our objection.

THE COURT: Okay.

MR. UZZI: Good morning, Your Honor. Gerard Uzzi of White and Case on behalf of Appaloosa.

We've already filed a notice of withdrawal of our

objection.

We did reserve the right to be heard with respect to the final order, and we had entered into separate agreements with the debtors with respect to specific relief for Appaloosa under the interim order.

Because of the heavy negotiation of the final order, there's a little bit of ambiguity with respect to our -- our pending agreements over the interim order.

The debtors had represented to us that nothing in the final order is meant to supercede the relief that we received under the interim order. We intend to bring down our agreements under the final order once the final order is entered, and I believe we're pretty close to final resolution on those final orders -- rather, the final agreements --

THE COURT: All right. Because, you know, Paragraph 2 says the final order shall supercede the interim order. So you're saying that as far as Appaloosa is concerned, the debtors have agreed that that's not applicable?

MR. UZZI: Yes. It's my understanding that the debtors have agreed that our agreements under the interim order will apply to the final order --

THE COURT: Okay.

MR. UZZI: -- and we intend and have shared draft separate agreements to make that happen, and as long as that does happen, then we do not have an objection to the entry of a final order.

THE COURT: All right. Then the debtors are in agreement with that?

MR. SPRINGER: That's right, Your Honor.

THE COURT: Okay.

MR. SPRINGER: The interim order anticipated separate side agreements. We gave one to Appaloosa, and we'll be bringing that down.

THE COURT: All right. Well, I guess -- this sort of went to my question about who did you serve because the final order does say it supercedes the interim order without any reservation.

So I guess except as to Appaloosa, the way I read it is that it does supercede it. Unless you have some other understandings with people that I -- that you ought to set out in the record.

MR. BUTLER: Yeah, I think we need to make -- I do think -- you know, counsel for Appaloosa sort of confused the record a little bit.

The order is superceded. The final order supercedes the interim order.

THE COURT: Okay.

MR. BUTLER: The agreement that was made during the interim period was that we would have separate written agreements and waive --

THE COURT: Oh, all right.

MR. BUTLER: -- with certain parties. We have that -

-

THE COURT: All right. So your agreement still exists, and they're not superceded, just the order itself.

MR. BUTLER: That's correct, Your Honor.

THE COURT: All right. Okay.

MR. UZZI: But, to be clear, yn, our separate agreement was negotiated in the context of the language of the interim order. There is some ambiguity with respect to the language in this order. The agreement is that the final order does -- there's nothing in the final order that otherwise supercedes our prior agreement.

THE COURT: Okay. That's fine.

MR. UZZI: One other issue, Your Honor, and I'll be very brief.

As counsel has represented, Appaloosa also has a pending motion for the request to appoint an equity committee. I hope after this hearing to resolve the scheduling issues.

Appaloosa in connection with the NOL order that's before the Court right now represented its own interests and continues to represent its own interest. There's obviously some issues in here that might be of concern to an equity committee if it's appointed. The order is styled the final order. We believe that it's appropriate that -- that the order be entered without prejudice to an equity committee in the event one is appointed.

THE COURT: Well, I don't think that -- they can file

whatever they want to file, but I think it would have to be under Rule 60(b) and not under -- not under the terms of the order.

MR. UZZI: Fair enough, Your Honor. I just wanted to raise it for --

THE COURT: I mean, assuming one is appointed. I'm not saying that one should be or -- that's something for the U.S. Trustee to consider in the first instance.

MR. UZZI: Understood, Your Honor.

THE COURT: Okay.

MR. UZZI: Thank you.

THE COURT: Okay.

MR. BROMLEY: Good morning, Your Honor. James Bromley of Cleary Gottlieb on behalf of the ten investment banks that objected on the first day and those objections still stand.

I wanted to just give a little bit of color as to how we got to where we are. On the first day of this case, there were three pending cases all seeking very similar relief, Northwest, Delta and Delphi.

With this -- the entry of this order, I think it's fair to say that all three cases resolved very similarly. We're very pleased with the results. We'd like to pay a debt to Cliff Gross, the tax partner at Skadden who worked through this over three months to get it done, but we think it's a fair and appropriate resolution of the issues.

THE COURT: Okay. While you're up here, because you and the gentleman standing next to you probably can explain this best. I went through this, it's one of the reasons I was a little late for the hearing, and I think I understand what it's generally doing which is similar to the issues you had raised in your objections: that is, how to enforce this without being unduly burdensome or jumping the gun, if you will.

But I don't understand Paragraph 6(b) which is prefaced now by the phrase "in order to permit reliance by the debtors upon Treasury Regulation Section 1.3(a)(2)-(9)(d)(iii)" (sic) and then it says -- the teeth in the order-- any entity found by the Court to have willfully violated the participation restriction shall be required to dispose of newly traded -- covered claims, but I'm not -- I don't -- my question is what is a Aparticipation restriction.@

As I read it, it's not disclosing information to the debtor, which didn't seem to make sense to me.

MR. SPRINGER: It's -- a participation restriction is a restriction against the claim owner telling the debtor in connection with the presentation or preparation of a plan we obtain these claims on a specific date.

THE COURT: Okay.

MR. SPRINGER: And that's something that's prohibited by the Treasury Reg --

THE COURT: All right.

MR. BUTLER: 1.3(a)(2)-(9) --

THE COURT: So this is -- this is a limitation on the general notice issue where there's -- where there is a form of disclosure then.

MR. SPRINGER: That's right.

THE COURT: And it's to comply with this regulation which I guess is designed to prevent tax code manipulation?

MR. SPRINGER: Exactly, Your Honor.

THE COURT: All right. Okay. All right. But this isn't the trigger for the whole order. This is just a specific provision dealing with this specific regulation, making sure it's not breached.

MR. SPRINGER: Correct.

THE COURT: Okay. All right.

All right. Mr. Fox?

MR. FOX: Thank you, Your Honor. Edward Fox with Kirkpatrick and Lockhart, Nicholson, Graham on behalf of Wilmington Trust Company as indentured trustee.

Mr. Springer's statement is correct, we have agreed based on the changes in 6(b) as well as Section 12 to withdraw our objection. Our objection was limited to the Section 6(b) which was added to the final order. It was not in the original language, and we had concerns about that, too.

Ordinarily, trading orders are not something that we generally involve ourselves in, but since this limited -- potentially limited people's participation in the process, we

had some concerns about it, and -- and, in fact, this language is slightly different than the LSTA form which limits these requirements to the substantial holders, not to everybody, although the debtor is correct that the Treasury Regulations that are referred to here would apply to everybody and not just the substantial holders.

What we've agreed to -- what the debtors agreed to do is limit the sell-down provision so that it limits and clarifies the remedy that would be involved if somebody violates the provision, and in addition, they've agreed to file an ~~AK~~ 8-K with this document attached so that there's hopefully some better notice. I mean, somebody buying into this case at this point or later in the -- in the case would have to wade through several thousand docket entries potentially to find this. Hopefully, they'll have a better opportunity if they're looking on the SEC filings to see it and realize what the obligations are.

THE COURT: Okay. So the debtors will be filing an ~~AK~~ 8-K with this attached?

MR. SPRINGER: Yes, Your Honor.

THE COURT: All right. Very well. All right.

MR. SPRINGER: There are a few more matters that we'd like to make of record with respect to this motion, Your Honor.

The debtors again want to emphasize that it's critically important to prevent Delphi from undergoing an ownership change under Section 382 of the Internal Revenue Code

prior to the effective time of a plan of reorganization.

Such an ownership change could severely limit the debtors' ability to use their valuable net operating loss carry forwards, credit carry forwards, built-in losses and other tax attributes to offset income during the restructuring process and post-confirmation.

For purposes of context, the total tax value of those tax attributes is currently estimated to be well in excess of one billion dollars. Additionally, if there is an ownership change of Delphi, and if the fair market value of the assets of the debtors is less than their tax basis at the time, then for five years following the ownership change, the debtors' ability to deduct losses from asset dispositions or to take certain depreciation or amortization deductions may be substantially limited.

We want to be clear, Your Honor, that at this point the debtors believe that Delphi has not undergone a Section 382 ownership change. Accordingly, its tax attributes remain available to offset future taxable income. This prospect is of great value to the successful reorganization of these estates.

The final trading order is designed to preserve the debtors' tax attributes and to take full advantage of the special Section 382 bankruptcy rules. One of the special rules under 382 is Section 382(l)(5). We think it's important briefly to explain how this works.

Section 382(l)(5) applies if upon confirmation of a

Chapter 11 plan of reorganization at least 50 percent of the stock of the reorganized corporation is owned by preexisting stockholders in what are known as "qualified creditors."

Qualified creditors fall under three categories, those known colloquially as "old and cold creditors," "ordinary course creditors" and those who will own less than five percent of the stock of the reorganized company or de minimis creditors.

If a corporation qualifies under Section 382(l)(5), the general limitation under Section 382 of the Internal Revenue Code on the use of tax attributes does not apply provided that the corporation does not undergo another Section 382 change of ownership within two years of emerging from bankruptcy.

Your Honor, the final trading order like the interim trading order is intended to prevent an ownership change prior to the emergence of the debtors from bankruptcy and to preserve the possibility of a Section 382(l)(5) plan.

Your Honor, the record should reflect the differences between the interim trading order and a proposed final trading order. On the equity side, the number of shares used to determine whether an entity is or would become a substantial equity holder which is a defined term as used in the order, and thus, subject to the terms of the final trading order has been increased from 14 million to 26.5 million shares or about 4.75 percent of the shares of Delphi stock now outstanding as

opposed to two and a half percent under the interim order.

Second, the amount of time that the debtors have to object to a proposed transaction involving an acquisition or disposition of stock at the threshold has been reduced from thirty days as provided in the interim trading order to fifteen days in the proposed final trading order.

On the debt side, the dollar amount of claims used to determine whether an equity entity is or would become a substantial claim holder, also a defined term in the order, and thus subject to terms of a proposed final -- of the proposed final trading order has been increased 90 percent from 100 million to $190 million.

The interim trading order allow claim holders to freely trade, better warn them of the debtors' intention to formulate a final claims trading order that may require such entities and persons to dispose of claims against the debtors to the extent necessary and proper to protect the debtors' tax attributes under Section 382(l)(5), and that was in Paragraph 4(f) of Your Honor's interim order.

The debtors worked diligently with interested parties over the past three months to formulate a sell-down procedure that allows trading and claims while still preserving the debtors' ability to propose a plan of reorganization that qualifies under Section 382(l)(5).

Your Honor, the debtors believe that with the contributions that we've had by those who have raised

objections and other interested parties that the proposed final trading order reflects the state of the art in this area and is in the best interest of the creditors and their estates, and we would respectfully request that the Court enter it.

THE COURT: Okay. I will approve the final trading order. I think it does balance the ~~debtors'~~ debtor=s need and right to preserve its ability to confirm a plan that protects its tax attributes while also enabling as free a market ~~and~~ in the trading of the securities and claims of the debtor as possible.

So, in light of ~~their~~ there being no remaining objections and my own review of the order, I'll approve it.

MR. SPRINGER: Thank you, Your Honor.

THE COURT: I'm also glad that you're going to post the ~~AK~~8-K, because I think that's critical even though the market for these types of obligations and stock probably shrinks in terms of the players. It's still very active, and there may be parties who aren't readily aware of the order=s terms. So...

MR. SPRINGER: And that was Mr. Fox's suggestion. He made a substantial contribution --

THE COURT: Okay. I'm not sure you want to use those words.

(Laughter)

THE COURT: Just in a colloquial sense.

MR. FOX: He's a litigator, Your Honor. He doesn't

know what he said.

(Laughter)

MR. BERGER: Judge, Neil Berger again for the debtors.

Number 31 on the calendar is Behr Industries. This is a hearing concerning the Court's order to show cause, Docket No. 774 to compel Behr Industries to show cause why it shouldn't be held to have violated the stay for demanding and obtaining a payment in excess of a million dollars post-petition on account of pre-petition obligations.

Behr has responded, and while the parties continue the negotiations, this one does appear to be headed toward a contested evidentiary hearing. Just broad strokes, Your Honor, Behr has asserted two primary issues. One is financial ability, vendor rescue program, and while that's taken us part of the way, it certainly doesn't take us all the way on the dollars here, and Behr also asserts that while it obtained the payment, it wasn't the cause for the demand for the payment.

The debtors dispute that factually and we don't believe the documents support that allegation. Behr has requested some discovery on the fact issues and we have agreed that a sixty-day discovery window would be appropriate.

With Your Honor's consent, what we would propose is that this matter, today's hearing be adjourned to the March omnibus hearing to function as though as a final or a pretrial conference date, and that I obtain a separate date from

chambers as an evidentiary date on a non-omni day.

THE COURT: That's fine. For the pretrial conference, it would be helpful if you and Behr came prepared with what I hope would be a joint pretrial order laying out the witnesses, any anticipated evidentiary issues and an estimate of the length of the trial -- standing pretrial order.

MR. BERGER: Yes, Judge.

THE COURT: Okay.

MR. BERGER: Thank you.

THE COURT: Thank you.

MR. BUTLER: Your Honor, the next matter on the agenda, Matter No. 32 is a motion filed by the lead plaintiffs from the securities litigation for a limited modification of the automatic stay at Docket No. 1063. It is the first of three motions on the calendar, the others being matters -- Matter No. 33 and then again back towards the end of the agenda at Matter No. 37, three contested motions dealing with the lead plaintiffs' attempt to obtain discovery, and we'll cede the podium to them to present the motion.

THE COURT: Okay.

MR. ETKIN: Good morning, Your Honor.

Michael Etkin, Lowenstein Sandler on behalf of the lead plaintiffs as bankruptcy counsel to the lead plaintiffs in the consolidated securities litigation, and I will present the initial matter that's on the agenda for today.

Your Honor, I'd like to begin by stating the obvious,

that this is a motion for a limited modification of the automatic stay. It is not a motion seeking to lift the stay so as to proceed against the debtor in connection with the securities litigation.

What the motion does seek are documents that have already been assembled, indexed and produced in connection with various demands for documents by the SEC, by the U.S. Attorney's Office and the FBI as well as documents produced in connection with the internal investigation commenced by the -- by the debtors.

And, also, again I believe stating the obvious --

THE COURT: I'm sorry. I thought you were -- when you say as well as documents produced as part of the internal investigation, I thought you were seeking only documents that had already been produced to third parties.

MR. ETKIN: That's correct, Your Honor.

THE COURT: Okay. Maybe I just misheard you.

MR. ETKIN: Yeah. That's correct.

THE COURT: Okay. You're saying the third party would include the internal ~~board~~ audit committee's counsel?

MR. ETKIN: That's correct, Your Honor, all of course subject to --

THE COURT: So you would count them as a third party --

MR. ETKIN: That's correct, Your Honor.

THE COURT: All right. Okay.

MR. ETKIN: And all, of course, as we've indicated and as has been the case in prior orders entered in this district subject to privilege to the extent that privilege has not been laid.

THE COURT: Okay.

MR. ETKIN: Your Honor, and again, just to make it clear to the extent that it isn't, we recognize that this is a two-step process that initially we need to get relief from this Court with respect to the limited modification of the automatic stay, and then we need to proceed to get relief from the district court in connection with the PSLRA stay. So this -- this motion really must be viewed in that context.

Your Honor, in the debtors' opposition, I think we've been criticized for relying heavily on previous decisions in Worldcom and Enron which are circumstances that we believe are identical to the circumstances that are raised with respect to this motion, and in relying heavily on previous decisions, we believe that all we've done is do what lawyers are supposed to do, which is rely on precedent coming out of the same district that dealt with not only similar sets of fact, but we believe essentially identical sets of facts.

THE COURT: Were those actually litigated decisions?

MR. ETKIN: Yes, Your Honor. I was involved. So, yes, they were litigated. I was involved in the Worldcom motion and that was litigated, opposed, and Judge Gonzales --

THE COURT: So did the -- the orders that you attach

are the result of a decision in a matter that he actually decided between the parties?

MR. ETKIN: That's correct, Your Honor.

THE COURT: Fine. Okay.

MR. ETKIN: The order in Worldcom was not a stipulated order.

THE COURT: Okay.

MR. ETKIN: That I can tell you from personal experience.

THE COURT: Okay.

MR. ETKIN: Your Honor, even the debtors although they raise issues as to the precedential value of those decisions, they even concede in their papers that this precedent is at the very least highly persuasive, and measuring this case against the situations in Worldcom and Enron all involve the backdrop of massive accounting scandals with enormous losses to the investing public. All involve the backdrop of pending governmental investigations as well as internal investigations.

As the Court well knows, Your Honor, Enron and Worldcom were no less complex Chapter 11 cases than the Delphi case, and the parade of horrors that are speculated by the debtors as well as the standard floodgates argument that's conclusorily (sic) raised by the debtors in their opposition are exactly that: speculation and conclusory allegations.

I think the lesson to be learned is best learned from

what happened in Worldcom where that company, the largest Chapter 11 filed managed to successfully reorganize. Enron as well successfully confirmed its plan, both with no ill effects from the limited stay modification orders entered in both of those cases.

Your Honor, by making the motion that's before you, we are simply adopting a position and a procedure that has already been expressly approved in this district. Again, there's backdrop of Federal and civil criminal investigations, acknowledged significant accounting irregularities, years of accounting restatements, a self-imposed internal investigation commenced by the debtors, all strikingly similar to the backdrop of facts and circumstances in Enron and in Worldcom.

The debtors in their opposition make this appear as if this was a class action commenced willy-nilly by some corporate gadfly, the kind of class actions that the PSLRA presumably was intended to deal with.

Your Honor, as lead plaintiffs in this case appointed by the District Court, we have state pension funds and institutional investors, not individual corporate gadflies who take this matter very seriously on their own behalf and on behalf of the investors that they now represent as lead plaintiffs.

Your Honor, the debtors have really offered nothing in their opposition papers to dispute that the documents that we've requested which have already been produced have been set

aside, have been culled, have been reviewed, have been indexed, and we specifically in our motion --

THE COURT: Well, don't they say that -- I thought they -- I thought they dispute that.

MR. ETKIN: I don't see anything specifically in their papers disputing that. What I did read, Your Honor, is that there are statements that there's some -- some amorphous burden that they will at some point in the future attempt to bring before the Court. I didn't see anything specific in their papers. I thought that they reserved the right somewhere in their response to raise these issues or bring these issues before the Court at some later time.

I didn't see any indication that these documents have not already been set aside and have not already been produced, and essentially that's why we made the motion. We're not looking for documents that have not already been pulled together, set aside and produced.

THE COURT: Well, I -- I guess my question comes down to this. I understand that the orders in Enron and Worldcom, at least two of the three, you know, expressly recognized that lifting the stay in the bankruptcy case still leaves to be decided by the District Court the right of the securities plaintiffs to get access to the documents under the PSLRA, but you know, I'm not familiar with the facts of those cases. I don't know why it was important, for example, for those litigants to get the documents at that time or at least get

stay relief at that time.

But why not let the District Court decide first whether the PSLRA stay applies or not and then -- I mean, obviously, I would give you relief to the extent you needed it to seek that relief from the District Court, and then -- then I could decide on a record as to, you know, how -- how burdensome if at all under Sonax it is for the debtors to produce this under the 362 Sonax factors as opposed to deciding it somewhat in the abstract, because really I don't know what the District Court is going to do. I mean, is it prejudicial to you just to -- for me to say for now you're going to go to the District Court and ask the District judge if the -- if the PSLRA should be -- ~~you know, have the effect of a~~the stay ~~here~~ under the PSLRA should be lifted, not the Bankruptcy Code stay, and then I -- then I can decide the latter stay issue and I can do that on an expedited basis~~.~~?

I mean, you're going to have to do that anyway. So I don't understand why it's flipped the other way around.

MR. ETKIN: Well, Your Honor, we actually don't think that we flipped it. We think that we've followed the procedure that's been utilized --

THE COURT: Well, I understand. Just humor me for a minute. If you have to do it anyway, why should I decide this in the abstract?

MR. ETKIN: Well, Your Honor, I don't believe the Court is deciding this in the abstract --

THE COURT: But do I have to decide it at all. ? I mean, why should I -- why should I even spend any time on it if it's -- if it's, you know, possible or even more than possible than the District judge is going to say, well, until the motions to dismiss are decided, they -- I'm not going to give them relief from the PSLRA.

MR. ETKIN: The -- first of all, as the Court knows, we're acknowledging that this is a two-step process, and if the Court grants our motion, the debtor certainly does not -- does not have to produce a document until the PSLRA stay is lifted as well, and again, the Court actually alluded to an issue that is one of the issues why we went to the Bankruptcy Court first in both of those cases, which is that we believe that going to the District Court first without stay relief would be a violation of a 362 --

THE COURT: Well, but I could give you relief from the stay to go to the District Court. That's no problem. I don't have a problem with that.

MR. ETKIN: No, I understand you're saying that, Your Honor, but in terms of the process that we've utilized here, that's one of the issues that we took into consideration, and we believe that the issue of getting stay relief, this limited stay relief from this Court given the fact that these documents are just sitting there and have already been produced and it requires really no effort, and I understand --

THE COURT: But so that begs the questions. I mean,

if the debtors are going to say it does require effort, then I need to balance Sonax, and that requires a hearing and it may be a completely advisory or moot issue.

MR. ETKIN: Well, that -- the debtors had an opportunity to lay out in their opposition, Your Honor, what burdens that they would have to undertake in connection with producing these types of documents. They chose not to do that, and those really weren't issues in the prior cases and we suspect that they really shouldn't be issues here. The substantive issue of whether the PSLRA stay should be lifted is obviously a matter for the District Court, and we understand that.

We don't -- certainly don't view getting this type of limited stay relief a ministerial matter from this Court by any stretch of the imagination, but given the underlying circumstances, given what we're asking for, given the fact that we've already indicated in our moving papers that we would pay the cost of reproduction, there really is nothing else to do for the debtor other than if the debtor chooses resisting the motion before the District Court in the PSLRA -- in connection with the PSLRA.

So we believe that a process by virtue of the prior decisions has been outlined and we're attempting to follow that process. We believe that process makes sense because ultimately for purposes of the securities litigation, it is the District Court that makes the determination as to whether we

should get access on the merits prior to the motions to dismiss.

We're simply taking the first step that we believe is a process that's been endorsed in this Court previously.

THE COURT: Okay.

MR. ETKIN: And, certainly, Your Honor, and as evidenced by the orders entered previously in the -- in Enron and Worldcom, privilege issues that are raised can be dealt with. Those are lawyer-driven issues that can be resolved and certainly, nothing is intended to waive those rights to the extent that they -- that they still exist.

Your Honor, the bottom line is that the debtors in their papers really have advanced no argument whatsoever to distinguish this case from the circumstances in Worldcom and Enron.

THE COURT: Well, but the problem is I just don't really what those -- all I have is our orders. I don't really what those circumstances were. I don't know if they were under deadlines from Judge Harmon or Judge Cote. It's just -- I see that there's a -- there was an order granted and it recognized the type of relief you're seeking here, but I just don't know what the exigencies were to do it that way rather than the other way.

MR. ETKIN: Well, in each of those --

THE COURT: I don't know whether there was a hearing on the Sonax factors either.

MR. ETKIN: Your Honor, in terms of the Sonax factors, I think in the first instance, the Sonax factors really are -- they are certainly relevant, but more relevant to circumstances where a party is seeking relief from the State and continue with litigation in a court outside of the Bankruptcy Court.

We're not seeking that kind of relief. There have been decisions which we have cited in our papers where limited stay relief --

THE COURT: No, I know. You're saying basically the debtor doesn't have to do anything. It just has to move the boxes from one place to another.

MR. ETKIN: That's --

THE COURT: And you'll pay for moving them.

MR. ETKIN: That's -- that's the bottom line, Your Honor.

THE COURT: Right. Okay.

MR. BUTLER: Your Honor, the Court articulated what our concern is. We concur that this is a two-step process, but we think the first step is in the District Court, not here. Our understanding of what these -- of what the plaintiffs in Enron and Worldcom did was once they got the stay relief from the Bankruptcy Court, they ran to the District Court and said hey, District Court, give us -- grant us the relief because there's no reason why you shouldn't, we already got the Bankruptcy Court approval, and so they used Your Honor's

determination as the sword to go into the District Court.

A couple of initial comments, Your Honor. This is not Enron, and this is not Worldcom. Whatever our pre-petition accounting issues were, they were not the proximate cause and had no relationship to the commencement of these Chapter 11 cases. These Chapter 11 cases were filed as Your Honor knows because of our high legacy costs, because of increasing commodity prices and because of the deterioration of the North American automotive industry. It had nothing to do with accounting.

Now, we had pre-petition accounting issues that we will be addressing, but that is not why we are in Bankruptcy Court.

Number two, Your Honor, what plaintiffs are asking for really is an advisory opinion from Your Honor. They're asking without any evidentiary record here, there's none. They've offered no evidence. All right. They basically said it's up to the debtors to prove why we're prejudiced. Well, Your Honor, they failed to meet their burden, which I believe under Sonax means we don't even have to do anything and --

THE COURT: Well, but they're saying that -- I mean, let me paraphrase it and Mr. Etkin can correct me. They're saying that it's there, why not let us get started on reading it now rather than six months from now.

MR. BUTLER: Because, Your Honor, that's not what PSLRA allows them to do. They're asking you to give them here

on an advisory basis the ammunition to go to Judge -- to go to Judge Rosen, who by the way, just got these cases within the last thirty days. Talk about infancy of a litigation. These were just consolidated. They're just now in front of the Court. There's been no major activity, as I understand, in the District Court since that act occurred.

This motion was filed thirty-eight days into our bankruptcy and was heard less than ninety days after the commencement of these cases without a scintilla of evidence as to why it's necessary. They are a year probably or more away from being able to deal with the issues in the District Court, and Your Honor, we don't think it's fair. We think it's highly prejudicial to the debtors to have them come in here and say to Your Honor without any evidentiary demonstration by us.

Disregard Sonax because that doesn't apply to us. Disregard -- just take the Enron opinions and the Worldcom opinions which were very different cases and which, by the way, Your Honor, I don't believe based on our review of the record and some familiarity that I had with those cases, I don't believe that the issue we've raised in our papers was raised in those cases, which is if it's a two-step process, the first step is that the plaintiffs have to go to District Court and get relief from the PSLRA because then they're able to come here and demonstrate cause or at least argue they have cause. I'll argue that isn't even cause frankly when we get to that, but they can't demonstrate that.

They come before you with no ability to demonstrate any cause. They tell you -- if they're being straightforward, they tell you that Judge Rosen received these cases within the last thirty days. There has been no substantive activity in the cases since Judge Rosen received the consolidated cases. There's been no certification. There has been no -- the schedule set either for filing motions to dismiss.

You know, there -- you know, I mean, this is in such a different posture than those cases, Your Honor, and we really believe we have no issue. If they want to take a shot at -- you know, on that record in front of Judge Rosen on getting the PSLRA stay lifted, if they want to be able to do that and you want Your Honor -- we don't have an issue with that. We'll take that battle on in the District Court, but only if they're able to Judge Rosen to change what Congress had intended should they then be able to come back here, and at that point in time, we ought to have an evidentiary hearing and deal with the Sonax factors.

We think Your Honor has it exactly right, and we do think it's prejudicial, and you know, counsel can argue that it's not, but Your Honor, for example, to just give one example and, you know, maybe this matters, maybe it doesn't, but the reality is, Your Honor, the accounting issues here while important to plaintiffs are not the primary factors in this case, and as Your Honor knows, we were retained in July of last year to help on the restructuring.

Clearly, we need to get up to speed and understand those issues at some point. That hasn't even occurred in these cases. We've been a little busy in the first ninety days of these cases doing a few other things like getting financing in place and dealing with claims, trading -- assets and all the issues we've dealt with, with the committee. We haven't had -- and Mr. Rosenberg will tell you, we haven't had even the opportunity to have the initial briefing with the committee on these matters which they've requested and which we've agreed to provide and both Mr. Rosenberg and I need to get a little educated from special counsel about these matters. Neither of us had that opportunity.

This is extremely premature, Your Honor, and we think highly prejudicial, and we think the plaintiffs have got it exactly wrong and the Court has got it right.

Go to the District Court, see if you can get relief. If you can get relief from the District Court, then at least you arguably can say you've got cause under Sonax here and then the -- then the debtors are in a position with the creditors committee and the other parties in this case to take on the issue of whether or not in the balance of harms and prejudices which is a bankruptcy calculation by this Court whether or not Your Honor ought to then lift the stay or modify the stay in this case.

And we'd ask Your Honor to deny the relief being request other than giving them the limited opportunity to go

speak to Judge Rosen.

THE COURT: Okay.

MR. ROSENBERG: Good morning, Your Honor. Robert Rosenberg for the creditors committee.

Our silence until now on the various matters of course indicates consent or assent agreement with the debtors' position, and that of course is equally true on this one. However, I believe on this one, the issues are sufficiently significant that we ought to address them on the record.

Needless to say, we do agree with the assessment that Mr. Butler just stated. As he stated, we are struggling to get educated on what the issues are in this case and what should happen to them.

As Mr. Butler indicated, this was not the driving factor here in arriving in Bankruptcy Court unlike Enron and Worldcom, and therefore, simply is not at this moment at the very top of the issue list.

We strongly agree with Your Honor that the -- the plaintiffs here simply have the procedure backwards because there is no reason to consider the balance of prejudice kinds of issues under Section 362 until and unless the issue is ripe and relevant at the District Court issue -- level, and without an evidentiary hearing here, I daresay that I have a very hard time believing that there are a bunch of boxes sitting in a corner simply waiting for Federal Express pickup and that's all that's involved here.

To the extent that documents were previously delivered to a special committee at SEC, a justice department, whatever, that hardly suggests to me that they don't need to be entirely re-reviewed in connection with delivery to a private litigant, re-reviewed for privilege, re-reviewed for confidentiality, issues that may not be quite as relevant in the context of an internal or a governmental investigation.

So, unless the debtor tells me otherwise, I don't think this is a situation of saying to Federal Express come pick them up. Accordingly, I do think that an evidentiary hearing is required on the balance of hurt here and it is absurd to have one in a vacuum in a moot situation where the District Court has not said production is ripe.

Thank you.

THE COURT: Do you -- Mr. Rosenberg, do you remember when Enron filed? I'm just looking at these orders.

MR. ROSENBERG: I certainly do, Your Honor. December 2001.

THE COURT: Okay. Fine.

MR. ETKIN: Your Honor, obviously, the primary issue that's being raised is really somewhat of an chicken-and-egg proposition with respect to the District Court and this Court.

Mr. Butler talks about what Congress intended. I didn't see anything about the debtors' papers that pointed out some legislative history as to how to resolve that issue.

I think the only thing that the Court has to provide

some guidance as to how that issue has been resolved is how it has, in fact, been resolved previously in the two cases that have addressed this issue, and I think that raising the question of whether the filing itself was precipitated by the accounting improprieties is not really the issue.

The issue is what is the stat of play with respect to those accounting improprieties going into the Chapter 11 proceeding, and there, the similarities are striking with respect to restatements for years, admitted accounting improprieties with respect to prior financial statements, multiple government investigations. There are no distinctions as far as that is concerned.

And, in fact, if there weren't those governmental investigations and if there wasn't the previous production of documents to the government with respect to these issues, we wouldn't be making this motion.

We're not seeking discovery from day one with respect to our pending securities litigation. We're seeking access to documents that have already been produced, already have been reviewed, already have been indexed.

Now, Mr. Rosenberg talks about the prospect of having to review them again where the circumstances are different. Your Honor, those are red herrings. Those are roadblocks being thrown up now with respect to dealing with what is -- what is the obvious, and the obvious is that there's -- that there's no desire to impede the debtor from exercising whatever privilege

objections that they might have or whatever privilege that they might want to assert.

The orders that were previously entered in the prior cases specifically provided for that. The Worldcom motion was hotly contested by the debtor. Judge Gonzales issued an opinion --

THE COURT: Well, no, he didn't issue an opinion.

MR. ETKIN: He signed an order. I apologize. He signed an order based upon his decision and requested an order to be presented. That order was signed. That order provides all of the safeguards that the debtor could possibly want with respect to those documents.

This is really an example of an effort to create issues with respect to what has been the prior production of documents that have been reviewed, indexed and are waiting to be -- and are waiting to be copied subject to privilege objections which is lawyer-driven not debtor-driven, but a lawyer-driven process, and delivered over to the lead plaintiffs in connection with their obligations and responsibilities to move forward on behalf of the class that they represent with respect to the litigation against non-debtor third parties.

We understand what the PSLRA requires. That's a different showing to be made to a different court. The debtor does not have to do one thing until the District Court decides that issue, similar to what was decided in the Enron and

Worldcom cases. There's no need for a chicken-and-egg issue. There's no need to reinvent the wheel with respect to how this process has worked previously. It should work no differently in this case.

THE COURT: Okay. All right.

I have in front of me a motion by the lead plaintiffs in the Delphi Corporation securities litigation for a limited modification of the automatic stay under Section 362 of the Bankruptcy Code to permit them to receive all documents previously provided by Delphi to third parties including, an internal audit committee investigation as well as the SEC and others.

The issue as I see it is really pretty limited at this point, which is an issue of timing. That is because the movants acknowledge that even if I were to lift the automatic stay to permit the production of such documents, they could not be produced until the movants also obtained relief from the District Court presiding over the securities litigation. ~~.~~

~~U~~under the Private Securities Litigation Reform Act of 1995, the PSLRA, which contains a separate stay driven by different considerations than the automatic stay, ~~that~~ which separately currently stays the pendency of discovery in the underlying securities litigation.

To me, the first gatekeeper issue is obtaining relief from the stay ~~to obtain~~ -- relief from the stay in this court under Section 362 to seek relief from the PSLRA stay. That's

the first gatekeeper issue.

In my mind, logically, the next gatekeeper issue is obtaining relief from the District Court under the PSLRA. The District Court is dealing obviously not only with that statute but with discovery issues generally in consolidated litigation that is clearly at a very early stage, and it seems to me that I cannot reasonably predict what the District Court would do in connection with an application for relief under the PSLRA for production of documents or what sort of time—table the District Court will set for the production of documents.

Given that fact, it seems to me that what I'm really being asked here to do to the extent it goes beyond a request for relief from the stay simply to go ask the District Court for relief under the PSLRA, is in essence to decide an issue in a vacuum or to give an opinion that is not at this time ripe to be given.

To my mind, that would end the issue but for the fact that apparently at least in two instances, a similar issue was raised in the Bankruptcy Court in front of Judge Gonzales first in the Enron case and then second in the Worldcom case. The movants have attached orders issued by Judge Gonzales in those two cases, the first of which I note was issued very early in ~~the case in~~ the Enron case and does not mention the PSLRA, and it's not clear to me whether this issue was even considered in connection with that order.

The second Enron order and the Worldcom order

attached do specifically note that the relief granted to the securities litigation plaintiffs is still subject to any determination by the District Court presiding over the securities litigation, including under the PSLRA, but I cannot tell much more from those orders, which are just that. : orders; tThey don't contain findings of fact, and there's no oral ruling that would lay out findings of fact and conclusions of law as to why Judge Gonzales granted that particular relief.

One of the things that's not clear to me is whether there were any communications directly or indirectly from Judge Harmon or Judge Cote, the judges presiding over the District Court litigation referred to in those two orders respectively. , about tThe timing issues involved or the like.

So I think that not only ~~an issue~~as matter of judicial economy, but frankly to avoid deciding an issue that's not ripe, all that I will grant here today is relief from the stay to seek relief from the PSLRA stay in the District Court.

If such relief is granted ~~before the hearing where~~and the facts will be clear as to what -- what discovery if any the District Court authorizes under the PSLRA and then I'll decide whether the automatic stay should in any way restrict that discovery. Frankly, if, in fact, it's simply a matter of picking up boxes and limited review by counsel, it may not be much of an issue.

On the other hand, I'm not going to get into the facts at this point because I think it's premature and there

may be other considerations that are relevant under the Sonax factors.

Moreover, at that time, there may be a more complete discovery plan or a more complete litigation schedule that will help me decide the issue. So I will grant relief from the automatic stay for the limited purpose of seeking relief from the District Court under the PSLRA.

And, Mr. Etkin, I will carry the rest of the motion. You can put it on the docket on short notice. I don't think that there's a need to have a lengthy delay after the District Court rules.

MR. ETKIN: Thank you, Your Honor.

THE COURT: So I don't know which one of you should submit an order to that effect.

MR. BUTLER: Your Honor, we'll draft an order and show it Mr. Etkin on that matter (sic).

Your Honor, also just so the record is clear today because I don't want either the debtors or the lead plaintiffs to be in a position to characterizing what occurred here today in front of the District Court along the lines, say, gee, Judge Rosen, you know, go ahead and approve this because it will -- you know, Judge Drain is ready to sort of, you know -- you know, open the floodgates here.

THE COURT: I think there are very different issues involved. I think the PSLRA addresses quite different issues than the automatic stay addresses and I wouldn't presume to

give a District judge any sort of direction about how he or she should manage their discovery docket or the PSLRA, and really my ruling is based simply on, first, that deference and then issues of ripeness.

MR. BUTLER: And may the order also include a statement that the rights of the debtor and the creditors committee are fully reserved -- preserved in connection with the --

THE COURT: Yes. I mean, everyone's -- yes.

MR. BUTLER: I just think --

THE COURT: I think -- normally, I recommend people don't do that because then everyone wants to stand up and reserve their rights, but I guess in this instance, it's appropriate so that there's no confusion with another court, but obviously, the class action plaintiffs' rights are fully preserved, too.

MR. BUTLER: We understand that, Your Honor.

THE COURT: Okay.

MR. BUTLER: Thank you very much, Your Honor.

Your Honor, the next matters on the agenda are Matters 33 and 34. These involve the application of the debtors for the retention of Deloitte and Touche, LLP as independent auditors and accountants to the debtors only with respect to the 2005 fiscal year that has been completed.

The debtors have previously announced that they have -- after a request for a proposal request that the debtors have

engaged other accountants going forward and will be filing a separate application in connection with the retention of auditors for the 2006 fiscal years --

THE COURT: I think that's on my desk, actually. I think it's on my desk, isn't it? Yeah.

MR. BUTLER: Yeah. So it's -- that we'll be moving forward on that separately, Your Honor.

THE COURT: All right.

MR. BUTLER: Your Honor, the -- Matter No. 33 is lead plaintiffs' motion to compel deposition testimony filed at Docket Number -- I believe it's 1618 and we have filed -- debtors have filed a motion to quash at Docket No. 1666 and there have been other replies filed.

Your Honor, Deloitte and Touche, LLP was one of a handful, I think four or five entities that Skadden disclosed in our retention papers exceeded the one percent threshold in terms of revenues with the firm in connection with the guidelines and discussions of the United States Trustees' office and their protocol. Without acknowledging that there would be any conflict of interest here, we concluded that we should not handle this particular matter but defer to other counsel.

Normally, that would go to Mr. Togut and Mr. Berger, conflicts counsel, but Shearman Sterling who is special corporate counsel in this case had, in fact, been handling the Deloitte retention from the beginning because we recognized

this in our pre-petition period and they've handling that, and therefore, they will be handling this matter today.

Mr. Roll will be dealing with Matter No. 33 in defending the debtors' interest there.

The Matter 34, my understanding the actual application, the only thing that's going to be dealt with today I believe are discovery matters which is Matter 33, and my understanding Matter 34, the actual merits of the retention of Deloitte and Touche I believe has been adjourned to January 13th as I understand the schedule.

THE COURT: Right.

MR. BUTLER: So, with that in mind, the only -- as to Matter 33, the lead plaintiffs -- litigation again, I'll cede the podium to lead plaintiffs, and Mr. Roll will defend the debtors' interests.

MR. ROLL: Good afternoon, Your Honor. William Roll of Shearman and Sterling appearing on behalf of the debtors.

As Mr. Butler indicated, Number 33 comprises competing motions by the debtors on one hand and by the lead plaintiffs on the other, the lead plaintiffs in the securities litigation raising essentially the same set of issues, the same three issues said to arise in connection with the debtors' application to -- for authorization to retain Deloitte for the limited purpose of the 2005 audit.

At the outset, Your Honor, I would say it is not a stretch to say that if Your Honor grants the lead plaintiffs

the relief they're seeking in connection with Number 33, the motions I'm going to talk about, it will in effect moot much of the discussion the Court just had and much of the determination the Court just made with respect to the preceding motion on the lifting of the stay.

I say that because what the lead plaintiffs essentially are seeking to do here, that is in connection with the Deloitte application and the discovery issues in connection with the Deloitte application is to get discovery in connection with the securities litigation.

THE COURT: Although they signed a confidentiality agreement saying that they won't use it.

MR. ROLL: They did sign a confidentiality agreement, Your Honor. It is a standard -- I think what most lawyers would consider a standard confidentiality agreement. It does restrict what they can do in many respects with the information they get, but it does not address the fundamental problem we see here which is they are asking for things as counsel for lead plaintiffs put it earlier when they said this is what they're not doing. This is, in fact, what they are doing.

They're asking for things that go back to day one in connection with the securities litigation, and I think the best illustration of that is to look at the actual document request that they've made.

Perhaps I should back up. The three -- the three issues before the Court raised by the competing motions are the

propriety of their request to the debtors for documents about which I'll speak in a moment.

There -- having served trial subpoenas or subpoenas for the hearing in connection with the Deloitte application and all the members of the Deloitte audit committee and our motion to quash that and their effort to seek further testimony from Mr. Dellinger, Delphi's CFO who has already testified in a deposition with respect to the issues going -- the proper issues going to the Deloitte application.

Mr. Dellinger declined on the basis of the attorney-client privilege to answer a number of questions put to him in that deposition.

With respect to my point earlier about they're trying to get at the things that Your Honor just said they should seek relief from the state first to be able to get. The document request they have made here makes it crystal clear that they're going way beyond what they should be trying to get in connection with the Deloitte application.

What they should be trying to get are documents relating to the general competence to complete the work with respect to 2005 and to do the 2005 audit and relating to Deloitte's disinterestedness under the Bankruptcy Code.

Instead, what they have sought is just about everything that the debtor has relating to Deloitte or indeed even accounting issues going back as far as 1999. I don't want to burden the Court with every element of their seven-page

single-spaced request, but I do want to point out maybe a half a dozen that make this point very clearly.

They have asked, for example, that we produce -- and asked by the way that we produce this in essentially two business days -- all minutes of the meetings of the audit committee. All minutes of all meetings of the audit committee of Delphi from January 1, 1999 to the present. All memoranda and reports submitted by Deloitte to the audit committee from that same date from January 1, 1999 to the present.

All memoranda and all reports submitted by Deloitte to the company relating to any problems encountered during any of Deloitte's -- any of Deloitte's audits of the company's financial statements again going back to presumably the beginning of time.

All memoranda on internal controls, management letters and similar documents submitted by Deloitte to the company or its audit committee again from January 1st, 1999 to date.

And the list goes on and on and on and on like that. These clear do not go to the issues that are properly -- or will be properly before the Court on the application to retain Deloitte.

THE COURT: And, just for the record, that application as to retain Deloitte to solely complete the 2005 tax audit?

MR. ROLL: To complete the audit of the company's

financial statements for 2005 and --

THE COURT: So they're not providing any other services in the bankruptcy case?

MR. ROLL: Not to my knowledge, Your Honor. So it is limited to that --

THE COURT: And -- and it's a different engagement team?

MR. ROLL: It is a different engagement team. The papers submitted by the debtors in support of the application to retain Deloitte make that clear. In particular, the affidavit from the Deloitte partner who will be heading the engagement team makes clear that it's a different team.

I believe Mr. Dellinger when he testified in his deposition at the lead plaintiff's behest testified to that same point. So the issue -- that issue has been addressed.

THE COURT: Okay.

MR. ROLL: And the kinds of things that the lead plaintiffs are looking for as illustrated by those requests that I read to the Court simply don't go to that kind of an issue.

You know, I'm going to refer to Worldcom, too, but I have the easiest task with respect to the decision there. Whatever that -- that case may have said or whatever the judges -- any judge in that case or any other case may have said with respect to whether lifting the stay was appropriate or not, it is without doubt the case and others like it at least stands

for the proposition that if there is a stay in place then you cannot use the bankruptcy process to get discovery in connection with the stayed litigation, and that's precisely what the lead plaintiffs are trying to do here, not just in connection with the document request as indicated, but also with respect to their entire discovery effort related to the -- to the Deloitte application.

That's the first issue, the documents. The second issue, the second main issue or set of issues relates to the subpoena served on all of the members of the Deloitte audit committee. First of all, the lead plaintiffs know or at least should know one of the four individuals who were subpoenaed is in Brazil, not here in New York, and it would be to say the least a significant hardship for that gentleman to come here to testify just at their behest in connection with this application on issues as we see it are not necessary to a court's determination of that issue.

Secondly, there's another member of the audit committee, Mr. Walker, who the lead plaintiffs know or should know has only recently joined the audit committee and clearly by any objective measure has not been involved in issues relating to the restatement, Deloitte's work in connection with -- with Delphi previously or anything like that.

That leaves only two, and even those two are unnecessary because as the debtors have said it and conveyed to the lead plaintiffs from the start, everything they need to get

in terms of the debtors' reasoning for wanting to employee Deloitte on the limited basis we're asking to do can be obtained and could have been obtained from Mr. Dellinger, the company's CFO, who we did make available promptly for a deposition, and I would add that the lead plaintiffs, they were offered several hours of his time and used only a couple hours of his time.

THE COURT: Is he the only witness that the debtors would call at the hearing?

MR. ROLL: He is -- he's one of two, Your Honor. We would intend to call Mr. Plumb as well.

THE COURT: From Deloitte.

MR. BUTLER: From Deloitte. I would note that as to Mr. Plumb, the plaintiffs have made no effort to depose him, and I should also note, and I think this is very telling. The retention of Deloitte, the retention of any professional is an important matter for any debtor and for the estates, only the lead plaintiffs here have sought discovery of this sort in connection with this application.

The creditors committee has not. The U.S. Trustee has not indicated any need to see anything further. No other party in interest has come forward and said, yes, we'd like to see a whole bunch of information that we think goes to whether or not Deloitte should be retained for the limited purpose that the debtors are trying to retain it for.

Clearly, on a very sort of pragmatic level, that

illustrates that the lead plaintiffs are pursuing a very different agenda here from the one that all of the players properly on this stage are pursuing. They are, in fact, pursuing an agenda that's appropriate for their stage, for the securities litigation where they are big players, but they're not big players here, and they shouldn't be seen as that in connection with this -- with this very important matter to the estate.

That's the subpoenas to the audit committee. It's unnecessary. It's cumulative. Two of the individuals wouldn't even be appropriate in any event, and on top of that, I would also say that if one reads the transcript of Mr. Dellinger's deposition testimony, it's apparent that the members of the audit committee in all likelihood could -- could only duplicate in effect the factual items that he has testified to already with respect to the importance to the debtors of having -- of having Deloitte retained for the limited purpose of 2005.

Finally, on the issues arising from Mr. Dellinger's deposition testimony, it's a slightly different set of issues there. The problems that the lead plaintiffs have with his testimony don't go to so much whether or not his -- his testimony is appropriate for the Deloitte application versus the securities litigation but rather to our assertion in a number of limited instances that -- that what they are asking for and look what they were asking for him to testify about would have necessarily divulged attorney-client protected

information.

And to be a little more specific, in a number of instances, it -- Mr. Dellinger had made clear that his knowledge with respect to certain items derived entirely from discussions he had and meetings he attended with counsel for the company and only counsel for the company and others affiliated directly with the company.

That's a classic situation calling for a proper end location of the attorney-client privilege. When the lead plaintiffs continue to probe on -- on those meetings, the instruction was given that he not answer and he followed that instruction.

It's not for me to suggest to the Court what it should do on this, but I would say that if one -- if anyone were to read the transcript of Mr. Dellinger's deposition testimony and it's not that lengthy -- it's only about seventy pages -- it becomes clear very quickly that what was going on there was the sort of thing that goes on at just about every deposition in any litigation in this country every single day. There are questions that on their face and as amplified by testimony from the witness would -- would invade the privilege if there's an instruction not to answer and the witness follows that instruction.

There was no effort made to impede the lead plaintiffs' ability to get at Mr. Dellinger's knowledge with respect to the urgency of getting Deloitte employed or having

them go back to work and having them do the work necessary to complete the 2005 audit. Indeed, he was fully prepared to talk about that.

He was prepared and did talk about what he understood about Deloitte's qualifications generally to do the work --

THE COURT: On the privilege point, the plaintiffs contend that the privilege was asserted on the basis that the lawyer was present as opposed to that the lawyer was giving legal advice or was reasonably expected to be giving legal advice and the like.

MR. ROLL: It is true, Your Honor, that that's what they assert, but it's -- it's not quite right. The privilege was asserted on the basis that the knowledge gained by Mr. Dellinger on the subjects being inquired about came from a discussion with counsel and counsel's client where there was an exchange of communication relating to the rendition or requesting of legal advice.

It's as simple as that. It's not just that counsel was sitting in the corner and two people at the company or two or more people at the company including Mr. Dellinger were talking in the same room about things that would otherwise not be privileged.

THE COURT: And counsel wasn't just reporting on prior meetings?

MR. ROLL: Not to my knowledge. My knowledge isn't even what's important here. Mr. Dellinger's knowledge on this

is important and, in fact, we have added his elaboration of what happened at those meetings to the record. We submitted a declaration by Mr. Dellinger following his deposition and following these disputes arising where he went into in more detail who was present at those -- there were four meetings, and what happened and who said what, all going to the point, the general point of his only knowledge relating to these issues being inquired about, these accounting issues being inquired about having come from his having heard that discussion and having been a part of it with counsel.

Mr. Dellinger is here today. So, if there's any further doubt about the circumstances giving rise to the proper end location of the privilege, if there's any doubt remaining after our having submitted Mr. Dellinger's declaration, I'm sure he'd be more than happy to lay that doubt to rest with additional testimony.

I don't know what the Court has in mind with respect to that, but he's here and he's more than happy to talk about that.

So all of that leads me to say -- and I don't mean to minimize the importance of these kinds of issues, but the attorney-client privilege problems here raised by the two parties, the two sides' motions are garden-variety deposition. They're garden-variety attorney-client privilege assertion-type issues. Indeed, and I mean no disrespect to the lead plaintiffs, but I feel duty-bound to say this as well, if they

really had a problem with -- a true problem with the assertion of the privilege, they were duty-bound to inquire a lot more than they did at the deposition about the circumstances in which the conversations occurred.

As we all know, it's counsel's duty to make an appropriate record if counsel thinks that the -- that the privilege is being asserted improperly. Here, the privilege was asserted. The instruction was given. The witness followed the instruction. Counsel made a complaining statement and basically moved on.

Even in the face of that, we submitted the Dellinger declaration to try to set the record straight and as -- set it straight as fully as we could about why the privilege was invoked and why we believe it to have been appropriate here.

THE COURT: Okay.

MR. ROLL: Thank you.

MR. SABELLA: Your Honor, Jim Sabella from Grant and Eisenhofer for lead plaintiffs.

Let me say at the outset that the issue of the PSLRA stay in this context I believe is a complete red herring. Whether or not any of the discovery we seek here could or could not be relevant to the securities litigation doesn't matter. What matters is, is the discovery sought here relevant to the application that the debtors made to retain Deloitte, and recall, we didn't initiate this proceeding.

If they weren't insistent on keeping Deloitte for the

2005 audit, we wouldn't be here seeking any of this discovery.

So the issue is simply whether the discovery is relevant there. We can't use the discovery in the securities litigation because we signed the confidentiality order that they drafted and put before us the day of the deposition, and we signed it without changes. There have been cases in this court and perhaps the best one is a called Recotin (phonetic) which we cite in our reply papers at 307 BR 751 where another judge in this court specifically said if discovery is relevant to something going on here, the fact that there's a securities litigation stay in another proceeding doesn't matter.

Is the discovery relevant here? Our objection to Deloitte is twofold. One is incompetency and the second is conflict of interest, and let me talk about the competency a little bit.

We know that there were major problems with Deloitte's audits of the preceding year's financial statements. How do we know that? Deloitte gave clean opinions that the accounts were presented in accordance with generally accepted accounting principles.

Now the audit committee did an investigation and they've restated all those financial statements and they've said that major transactions were improperly accounted for.

Now, we don't know exactly why Deloitte got it so wrong. We don't know whether it was -- at this point, whether it was the fault of just a couple of bad auditors in which case

perhaps changing the audit team might make a different or whether or not it was deficient audit procedures, and if it's the latter, what assurance do we have that Deloitte is going to get it right this time? None whatsoever, and that's why we're probing. What did Deloitte get wrong? Why did it happen? What did the audit committee find out when it -- when it did its investigation which led to these major restatements? They blocked all of that.

Counsel talks about the alleged burden in some of our document requests, but recall, they didn't take us up on our offer to try to renegotiate the burden, to try to have a limitation on what we were seeking. They gave a blunderbuss objection, not one piece of paper.

So I think the burden aspects or the overbroad aspects that counsel was suggesting are not what's going to carry the day here. They have taken the position we're entitled to know nothing about what Deloitte got wrong. We're entitled to know nothing about what the audit committee looked at when it made its restatements. What did it find out about Deloitte's procedures? What assurances did it get Deloitte is not going to blow it again?

We're not entitled to know anything about that. They won't give us any documents. They won't give us any testimony.

Now, we've also talked about the internal controls aspect of the competence. Deloitte was required at the time it did its audits to give advice on internal controls and the

adequacy of internal controls. The company has now said there were material weaknesses in internal controls during the years that Deloitte did those deficient audits.

So we've asked what did Deloitte tell you about the internal controls? Did they identify those problems? If not, why not? Did the audit committee look into that and find out how did they miss those serious material weaknesses in internal controls. They won't tell us, won't give us any documents, won't even give us the management letters that Deloitte gave to the company at the time when it purported to report on internal controls.

So how does one appraise -- how do you get your arms around whether or not Deloitte is up to the job to do the 2005 audit when we have no idea how it happened that they got it so wrong in 2001 and 2002 and 2003.

THE COURT: ~~Doesn't~~ Hasn=t every accounting firm, every large accounting firm gotten it wrong in connection with ~~a~~ at least one large company in the last several years? I mean, can't you take your argument to the extent that, you know, you could discovery of -- in connection with name whatever disaster any accounting firm was~~they were~~ involved in, you know. Merry-go-round, for example, for E&Y.

You know, I mean, I'm just trying to figure out how far you could take that.

MR. SABELLA: Well, I wouldn't take it there, Your Honor.

THE COURT: I mean, they couldn't hire Grant Thornton, right, because they've been sued? They couldn't hire any of them.

MR. SABELLA: But the point is we know that Deloitte's --

THE COURT: If they've had restatements.

MR. SABELLA: -- that the relevant Deloitte procedures dealing with this company in this industry and the kinds of problems that these audits present were insufficient. Okay. Sure, every accounting firm gets sued, but we know that something very wrong went wrong on these audits, with this company, and doesn't the Court want to know why? I mean, are you going to just pay them an audit fee for 2005 and say, well, they got it wrong last time but I'm sure they'll get it right this time.

I think we're entitled to a little more than that.

THE COURT: Well, maybe, although you might—— posit to the contrary that they'll be walking on eggshells and doing everything they can to get it right. You know, so they are absolutely blameless --

MR. SABELLA: Well, I don't think so, Your Honor, for the following reason. They're a defendant in the securities litigation. To the extent that they really dig here and they find additional weaknesses in internal controls, additional errors in accounts, additional contracts that were improperly accounted for, they're digging their own grave in the

securities litigation. They're not going to want to do that.

THE COURT: That's a different point. I understand that point.

MR. SABELLA: Right. That's a conflict of interest point.

THE COURT: I understand that point.

MR. SABELLA: And I think it's a serious one.

Now -- so that essentially is our argument on the relevancy of at least some discovery. If they want to limit the documents, we can try to do that, but I think we're entitled to some discovery on some of these issues, and they've blocked all of it. If it's relevant, the PSLRA stay has nothing to do with it.

Now, counsel talked a little bit about the Worldcom case that he cites in his brief, which I think we've adequately distinguished in our reply brief, and it was a totally different situation. That was a situation where the people wanting discovery about KPMG, they waited a year after they knew about the disqualification-related issues and it really smelled that all it was, was an effort to get discovery for use in another proceeding, and in that case, the company said, we are so sure KPMG is okay here that we are not going to sue them no matter what comes out.

They went -- they went on the record as saying we don't have any claims against KPMG. Debtor has not done that here with respect to Deloitte. There's been no waiver of the

potential that the debtor is going to sue Deloitte or Deloitte is going to sue the debtor, and as Your Honor knows, in most of these accounting fraud situations, it's ultimately what happened. They point the finger at each other. So this is very different from the Worldcom case that counsel relied on.

Let me talk briefly about our desire to depose --

THE COURT: What more discovery do you need knowing that there's already a lawsuit against Deloitte and, therefore, potential claims going back and forth by the debtor? Why do you need more discovery? Can't you point to a potential conflict right there?

MR. SABELLA: Yes. I think on the conflict point you don't need a lot more discovery. I think it's more on the competency issue that you need discovery.

THE COURT: And isn't that the case particularly since E&Y is going to do the 2006 audit so they can certainly see if there are, you know, improper procedures that had been in place, and again Deloitte needs to be pretty concerned that it get it right in 2005 because another firm is going to be looking over their shoulder in 2006?

MR. SABELLA: Well, I don't think that's exactly right, Your Honor, because I mean, in 2006, Ernst & Young is going to be the 2006 audit, and it will be -- it will not be re-auditing 2001 or two or three or four or five --

THE COURT: No, but it's going to look at what --

MR. SABELLA: It's going to look at what Deloitte did

--

THE COURT: As far as, you know, controls and procedures ~~are~~ as concerned that are in the company.

MR. SABELLA: Yeah, but if Deloitte should come across some bodies in the closet in the context of this audit, I think they have more incentive than anyone in the world to make sure they don't come to light and to make it more difficult not less difficult for Ernst & Young to find it.

THE COURT: Okay.

MR. SABELLA: The additional discovery that we're seeking in addition to documents as counsel referred to is to examine a couple of members of the audit committee, and we'd be happy not to take the fellow in Brazil and not to take the fellow that just joined. I mean, you know, we're willing to negotiate those things.

The reason why we wanted members of the audit committee and not just Mr. Dellinger is number one, it's the audit committee that made the decision to stay with Deloitte for 2005 and it's the audit committee that made the decision to go with Ernst & Young for 2006, and we wanted to know what the audit committee knew, what it considered.

Mr. Dellinger didn't know obviously what conversations the audit committee members had among themselves. He obviously didn't know what conversations they had with Deloitte. Did they probe with Deloitte whether -- what assurances Deloitte could give about the 2005 audit? He didn't

know anything about that. He never discussed the restatements with Deloitte. He appeared not to know much about what the audit committee investigation showed and what little he knew, he refused to testify about either on the grounds of scope or on the grounds of privilege.

So we'd like to probe the audit committee. He didn't even know if the audit committee considered the conflict issue that Deloitte would have an incentive not to look back at prior transactions that might have been improperly accounted for. He didn't even know if the audit committee considered that.

So it seems to me that at a minimum we ought to get to Question 1 or 2 of the real decision makers who made the decision. He's been on the job for a month or two. The audit -- the process of looking for a new accounting firm which ended up with Ernst & Young being appointed, that process began before Dellinger was hired. Somebody else made that decision that we'd better be looking for another accounting firm.

And it's interesting, when they made their application in this Court to retain Deloitte, the application said they wanted to retain Deloitte for 2005 and thereafter although they had already put in progress the idea of getting a new accounting firm.

But, in any event, Dellinger wasn't there at the time they made those decisions. We asked them for all the documents that related to the decision to switch to Ernst & Young or the decision not to go with Deloitte and the decision to retain

Deloitte and they didn't give us any documents on those either.

THE COURT: Okay.

MR. SABELLA: So it seems to me the testimony from a couple of people there is not overly burdensome, and it's clearly, clearly relevant to what we want to do, and the objections that we filed.

Lastly, on privilege, counsel suggests that it was much more than a lawyer just sitting in the room, but when you look at the questions that I asked at that deposition, there was no suggestion that what I was getting at in any way related to legal advice.

I asked questions such as: Did any members of the audit committee say let's stick with Deloitte for 2006? Objection; privilege. There was a lawyer in the room. Did anybody say let's get rid of Deloitte for 2005? Objection; privilege.

THE COURT: Is that -- I confess, I looked at the transcript very quickly. It seemed to me that that response was basically because he didn't really know except because what a lawyer told him. He wasn't there, right?

MR. SABELLA: He was at the audit committee meeting.

THE COURT: HE was?

MR. SABELLA: Oh, yes. Yes. What --

THE COURT: All of them?

MR. SABELLA: He was at the two key audit committee meetings, December 6th and December 7th when they made these

decisions.

THE COURT: Not -- not the four.

MR. SABELLA: The point about what he knew came from what lawyers told him, that relates to the audit committee investigation, the restatements and the material weaknesses in internal controls. Basically, he said anything he knew about the investigation is what a lawyer told him, but even there, is that the conveying of legal advice.

I asked him who did the audit committee interview in the context of their investigation. Did they interview Deloitte people. Who did they interview? Objection; attorney-client privilege. He would have learned that from counsel.

Well, how is that conveying legal advice when you ask someone who did they interview and my lawyer told me these are the three guys. I mean, yes, it came from a lawyer, but that's not privileged information, and similarly, if the audit committee concluded Deloitte made these three mistakes, Deloitte's procedures were inadequate in these three respects, even if he heard that from a lawyer or even if he heard that from the audit committee with the lawyer in the room, it's not privileged information.

That's not a lawyer giving anybody legal advice. That's a lawyer reporting on a fact. So those are the problems we had at the deposition, but they basically put up a wall and said, anything he heard from a lawyer or anything he heard at that audit committee meeting, a lawyer was in the room, he

can't talk about it, except the subjects that he wanted to talk about because he did, of course, tell us that they decided to go with Ernst & Young.

So he was willing to tell us some of the things that went on at the audit committee meeting, but not the rest.

THE COURT: Okay.

MR. SABELLA: So, you know, Your Honor, there's really no way to get through the privilege objections, obviously, other than looking at the transcript and we can't, you know, go over them chapter and verse here, but it just seems to me that counsel ought to be instructed that those kind of blanket privilege objections aren't going to fly.

THE COURT: Okay.

MR. SABELLA: Thank you.

THE COURT: I have one question. In the relief requested, you say you want the complete responses to the interrogatories contained in lead plaintiffs' discovery request. I didn't actually see any specific interrogatories.

MR. SABELLA: Those are just really the first two questions which had to do with the composition of the audit team. You know, they've said now that they're going to replace the audit team, but we essentially asked for everybody who worked on the prior audits and everybody who is going to work on the current audit. They've replaced the partners and the managers.

I don't think they've made clear that they've

replaced all the lower-level people from the audit, and that's what we meant by interrogatories.

THE COURT: So they confirmed that -- that's what you were looking for?

MR. SABELLA: That's what we were looking for, yeah.

THE COURT: All right.

MR. SABELLA: Basically the identities of everybody on the audit team.

THE COURT: Well, okay. All right.

MR. ROLL: Very briefly, Your Honor. William Roll, Shearman and Sterling again on behalf of the debtors.

Just a couple of points. Counsel mentioned the Recotin case. It's a very different case. In that instance, it was the party seeking the discovery that was ultimately allowed by the Bankruptcy Court was the committee. It was not plaintiffs in the -- in the separate securities litigation and it was not clear that anything flowing to the committee in connection with their discovery request would flow to the plaintiffs in the related securities litigation and be used in connection with that.

So it clearly does not apply. It's a different case. I'm sure they cite it because it's just one instance where the Court allowed the discovery, but it did so on a very, very different basis than what we have here.

Secondly --

THE COURT: The general proposition is right. I

mean, even -- even the Worldcom case says if it's -- if it is relevant in a bankruptcy case then it's not superceded by another statute.

MR. ROLL: If it's relevant. That's a very big "if." And my -- my fundamental proposition, maybe I've been less than stellar in asserting is that they don't even satisfy the "if." There's -- they don't satisfy the relevance here because of -- or the best evidence of that being the breadth of what they had asked for, the fact that nobody else involved here has asked for anything even remotely close to that, and indeed, they haven't asked for anything like that in connection with E&Y.

And, as Your Honor pointed out, E&Y is going to be assessed as well in terms of its general competence, and so these same kinds of issues if they were appropriate with respect to Deloitte would be appropriate with respect to E&Y, and they've made no effort to do the same thing there. It's clear, their target is Deloitte because Deloitte is a defendant in the case, period, full stop.

It's as simple as that.

THE COURT: Now E&Y is going to get a deposition of this, right?

(Laughter)

MR. ROLL: I'm sure they'll thank me for having mentioned it, but it's a telling point, Your Honor, and I think it's worth all of us noting that.

The other thing I want to point out about E&Y is that -- and Your Honor touched on this a little bit in questioning counsel, during 2006 and beyond will necessarily require -- or E&Y in doing that would be required to look at as it does the -- in effect the opening balance for 2006. It will be required to look at the closing balances for 2005.

There is no question that from a pure accounting standpoint and auditing standpoint they're going to have to look at work done by Deloitte. So -- in connection with the limited engagement that we're seeking authorization for here.

So, you know, the issues are not going to go away in the way that counsel seems to suggest they are.

And then, finally, Your Honor, with respect to the privilege issue, again, and I don't mean to beat a dead horse or to be repetitive or take more of the Court's time than is necessary here, but the fact is that this particular witness we're talking about, Mr. Dellinger learned what he learned because of meetings and conversations that involved a client and counsel and there's no question, and if you look at the Dellinger declaration in particular and the specific questions that counsel was asking, there's no question that the only way he could answer the questions would be to reveal what he learned in the course of those privileged communications.

I mean, the -- I mean, in a conventional setting, I suppose the way to really get to this is to -- is to have the Court engage in some kind of an in-camera inquiry. We're happy

to have the Court do that if the Court wishes to do that, but I think it would take us to the same place, which is that as Mr. Dellinger has already testified in the deposition and in his declaration, he didn't know from any other source with respect to those questions as to which he was instructed not to answer, than a communication back and forth involving counsel and client.

Thank you.

THE COURT: All right.

MR. ROSENBERG: Your Honor, just very briefly. First of all, for the record, the committee has filed an objection to the form of the order that's proposed for Deloitte and Touche with respect to a couple of very, very narrow specific points, and that of course is not on the calendar today, but I just wanted to make that clear nor will it be handled by Latham and Watkins. Rather, it will be handled by conflicts counsel because Deloitte is a client of the firm.

You know, the committee looked at this issue very, very carefully, Your Honor, and perhaps we have a somewhat simplistic view of it, but to us, there are only two issues here. Does the audit have to be done and is there any alternative to even consider to Deloitte and Touche doing that audit.

And I don't think there is any dispute as to the answer on either one of those questions. We looked at it very, very carefully. We didn't see anything to dispute with respect

to either one of those issues, and to the extent that counsel is raising all kinds of other issues, to me, they're quite moot in the context of the answers to those two questions which, again, I haven't heard anyone dispute the answers to.

Accordingly, I think that this discovery is irrelevant, unwarranted and inappropriate. Thank you.

THE COURT: Okay. All right. I'm going to take a five-minute break, and then I'll be back about five of one.

A F T E R N O O N S E S S I O N

THE COURT: Please be seated. ~~If there's~~Is there any other party in interest ~~have~~that has anything to say on these motions?

(No response.)

THE COURT: All right. I have in front of me competing motions by the lead plaintiffs in the Delphi Corporation securities litigation on the one hand and the debtors on the other hand with respect to the scope of discovery of the debtors in connection with their application to retain Deloitte & Touche, LLP under Sections 327 and 328 of the ~~bankruptcy~~ Bankruptcy ~~code~~ Code to complete the 2005 audit of the debtors.

The issues, as I said, come down to the parties' different view of the appropriateness of the discovery sought

by the class action plaintiffs. In essence, the debtors contend that the discovery requested is not relevant and consequently burdensome or oppressive. And in addition to the normal oppressiveness of having to undergo irrelevant discovery, the debtors point out, which appears to me to be a ~~pure~~ pretty obvious fact, given the absence of any other objection or request for discovery here, other than the limited objection that the committee has made to Deloitte's -- ~~reasons of~~ Deloitte's proposed retention order, that there appears to me to be a separate agenda in connection with the discovery sought by~~of~~ the securities ~~by~~ law plaintiffs, which is to obtain information that would be relevant in their litigation in the district court and elsewhere potentially with respect to potential pre-petition claims against the debtor, discovery which would otherwise be stayed by the automatic stay, and, as I noted earlier, also, at least for now, by other federal law.

In determining whether the debtors are right and the request is unduly burdensome and irrelevant, I have to consider the underlying application that the discovery is ostensibly ~~went~~ meant to respond to.

An application to retain a professional raises essentially two issues. One is the appropriateness of retaining a professional in the first place. To some extent, that goes to the professional's competence. And secondly, to ~~order~~ determine if the professional satisfies the disinterestedness requirement of the ~~bankruptcy~~ Bankruptcy

~~code~~Code, which here essentially boils down to whether Deloitte & Touche holds an interest adverse to the estate.

Judge Gonzalez, in his opinion in In re: WorldCom, Inc., ~~33~~ 311 ~~D~~B.R. 151, Bankruptcy SDNY (2004) goes through the standard in more detail in the context of dealing with a similar, although not directly on point, ~~discovered~~ discovery dispute with regard to the proposed retention of an accountant.

In essence, the class action plaintiffs contend that they're entitled to probe whether Deloitte has an adverse interest in that ~~it~~ Deloitee is a potential target of a claim by the debtors in connection with the conduct of audits which ultimately were restated over the period of five years. In addition, they claim that they're entitled to prove Deloitte's competence as accountants and therefore, again, look into whether they conducted the audits improperly, which, by the nature of that inquiry, if conducted as the plaintiffs seek, would clearly in my mind spill over into whether the debtors themselves maintained proper accounting procedures and the like and, therefore, potentially reveal extensive information about the debtors themselves that could lead to additional claims being asserted against them or the refinement of claims that have already been asserted against them in the district court securities litigation.

Finally, the plaintiffs claim that the one deposition that occurred in this matter, of the debtors' current CFO, was inadequate for two reasons: first, that the attorney/client

privilege was asserted too broadly; and, second, that the CFO is not a sufficiently knowledgeable witness and that they're entitled to take further discovery of one or two members of the audit committee. And particularly given the lack of knowledge by the CFO, Mr. Dellinger, of various steps taken in connection with Deloitte & Touche by the board, including the decision to go out and look for other accountants, which resulted in the debtors' decision to retain Ernst & Young as their auditors for the year 2006.

I've reviewed the pleadings filed by the parties, including the deposition of the CFO, which I again took a look at during the break, and considered their arguments. And perhaps not entirely surprisingly, I agree with neither party entirely.

I believe that the plaintiffs do have a right to some additional discovery, given the lack of knowledge that Mr. Dellinger expressed about the debtor's decision to replace Deloitte with Ernst & Young. He came recently onto the scene and the decision to replace Deloitte with Ernst & Young was made, or at least put in motion or was under consideration before he came on the scene. Based on my reading of his deposition, he was somewhat sketchy about the decision. I believe, though, that unless another audit committee -- an audit committee member is equally sketchy, that one deposition of an audit committee member should be sufficient to pin down the details of that decision.

I agree with the debtors, however, that in light of the issues that I need to consider in respect to the underlying application, the extensive discovery sought by the class action plaintiffs of the debtors' accounting practices and the audits undertaken by Deloitte going back to 1999 is overkill, unduly burdensome, and oppressive.

I do not believe that, on the issue of competency, those areas of inquiry in this particular context are particularly relevant. I say that because the debtors have certified and, to the extent that that certification is not under oath, although I believe that counsel's representation is sufficient, it can be made under oath, that the new team of Deloitte personnel conducting the audit for 2005 is different, is a different team; and therefore, the issue of whether the audit will be conducted competently should really ~~be focusing~~focus on that team as opposed to what happened in the past. It's no secret that the big four accounting firms are enormous organizations with a fair amount of difference between the various parties conducting audits and the fact that Deloitte ultimately required a restatement of its prior audits, in my mind, is much less important as far as the issues I need to consider with regard to the retention application than the competence of the current team.

I note, as I said during oral argument, that I can't think of any big-four accounting firm or the other two that are nipping at their heels that has not experienced, to its

misfortune, either actual liability for bad work or being sued for it. To put the debtors through the level of inquiry that the plaintiffs want here, in light of that fact, I think is ~~fully~~ really unnecessary, particularly, again, given the fact that the information is, as I said, transparently much more useful to the class action plaintiffs in a wholly different context for which they=d need stay relief.

Similarly, with regard to the conflict of interest issue, I think Mr. Sabella acknowledged that short of actually proving that there were something truly wrong here that would justify a claim by the debtors, there's not much more that discovery could show as far as a potential conflict of interest because the very fact of the restatement suggests that there is some potential conflict of interest here. I don't believe that the debtors, given the limited context of the relief that they are seeking, which is to retain Deloitte to complete the 2005 audit, should be put to the level of discovery that would be required to determine once and for all whether, in fact, Deloitte is liable to the debtors or not. I don't believe that's necessary for me to consider the application under Sections 328 and 327.

As I said before, the WorldCom case decided by Judge Gonzalez in 2004 raised similar issues. I do not believe that the fact that in that case he believed the plaintiffs had basically laid in the grass for a considerable amount of time before raising their concerns was the dispositive fact in that

case, but, rather, Judge Gonzalez's view that, given the issues to be decided by him in connection with the retention application, the irrelevant and burdensome nature of the discovery was overbroad was the main issue.

It is true that in that case, the debtors had stipulated that they did not believe they had a claim against the proposed professional, but that -- and that is clearly not the case here, -- but that fact in and of itself is something that I certainly will consider at the time I consider the retention application and I'll weigh that in the balance, along with the point that Mr. Rosenberg made, which is that, I'm sure it will be asserted then as it was asserted today, it's highly unlikely that the debtors can retain anyone to do the 2005 audit in any length of time or at the cost that Deloitte could do it.

So again, weighing the issues that need to be determined under Section 327 and 328 versus the discovery that's sought here on the issue of conflict of interest, I believe it's, again, oppressive and burdensome.

However, as I said, I do believe that it's appropriate to permit the plaintiffs to depose at least one audit committee member on the decision to seek to retain some other firm besides Deloitte, since I believe that that decision-making process is one that I should have the benefit of when I consider an objection to Deloitte's retention for the limited purposes of completing the 2005 audit and I don't

believe, based on reading Mr. Dellinger's deposition, that he's sufficiently knowledgeable on that issue.

As far as the attorney/client privilege issue goes, it seems to me that the privilege may have been asserted overly broadly in the deposition that has taken place already, although it's hard for me to know because there was not a great deal of probing of the basis for the assertion of the privilege, although there were objections to the assertion of the privilege. I also think that, in light of the other issues raised by the discovery requests, the assertion of the attorney/client privilege at times, particularly as it pertains to requests to go into the details of the audit committee's investigation and the history of Deloitte's lengthy retention by the debtors pre-petition, may have been simply a place holder for an objection on burdensomeness grounds. Again, I'm reading between the lines there.

I don't know if that was necessarily the case, but it seems to me that, given the fact that the audit committee appears to have been directly involved in the decision to seek a replacement for Deloitte for 2006 and going forward, the audit committee member should be deposed first. To the extent that there are disputes remaining as to whether the privilege is being asserted in an overly broad way with regard to that deposition and they can't be resolved, I'll hear those by telephonic conference and only if in such a conference I'm convinced that you need to go back to Mr. Dellinger again will

I require that.

So in sum, I'll permit a deposition of an audit committee member on the decision to switch horses ~~for~~ to E&Y -- from Deloitte to a different accountant going forward but to keep Deloitte for 2005. That deposition should not get into the details of the audit committee's investigation of Deloitte or the details of Deloitte's past history with the debtors and, of course, all rights to object on privilege grounds or otherwise are preserved. I'll determine, if the parties can't work out disputes over those objections, whether they were well-taken or not, but otherwise I will deny the request for additional discovery and grant the motion for a protective order and a motion to quash the subpoenas.

So you can submit an order, Mr. -- but run it by Mr. Sibello first.

~~COUNSEL~~MR. ROLL: Will do. Thank you.

MR. BUTLER: Jack Butler from Skadden again on behalf of the debtors.

Continuing with the agenda, the next matter is Matter No. 35. This is a motion for John C. Cox for relief from the automatic stay at Docket No. 1653. I'm advised that matter's been withdrawn.

The next matter, Your Honor, is Matter No. 36. This is the Law Debenture Trust Company of New York motion requesting an order to change the membership of the official committee of unsecured creditors found at Docket No. 1607. The

motion has been objected to by the United States Trustee, the debtors, the creditors' committee, and the agent for the pre-petition lenders. I'll cede the podium to counsel for Law Debenture.

THE COURT: Okay.

MS. CECCOTTI: Your Honor, I'm going to preempt counsel just for the process and ask for some guidance on. Babette Ceccotti, Cohen, Weiss & Simon, for the UAW. Good afternoon.

UAW has filed a motion for appointment to the creditors' committee that we have noticed for next month on with this hearing. We have followed with interest papers that have been filed in connection with Law Debenture, of course, and we believe, particularly after a brief discussion at the break with Ms. Martini and Ms. Davis, that the issues are sufficiently distinct that this matter may be able to proceed without prejudice or any sort of issue preclusion as to our matter. But I did want to raise the issue and just make sure that the Court is aware of our concern.

THE COURT: Well, I was aware of the application. I mean, obviously, to the extent I lay out a standard for considering such an application, you'll know what I think the standard is, but you're not a party to the motion in front of me.

MS. CECCOTTI: I'm not a party to the motion in front of you, that's correct. I believe that there is -- I'll

address a very narrow point, Judge, which is that they're -- in the case of the UAW, we have received what the U.S. Trustee's office has determined their final determination and we have filed our motion on that basis. I do not -- I believe there is a distinction with Law Debenture in that their matter may still be under advisement, and that may create, actually, a sufficient legal distinction even --

THE COURT: Is it under advisement? I thought it was done. Unless facts change, obviously, which may happen at some point.

MS. DAVIS: Your Honor, first, I'd like to object to this request. I have to tell you how surprised the U.S. Trustee was --

THE COURT: Which request? I'm sorry.

MS. DAVIS: The request for the Court to consider any aspect of the UAW's case.

THE COURT: No, I don't think that's what Ms. Ceccotti's doing. I think she just wants to make sure that she's -- that I agree with her that this is not res judicata or collateral estoppel on her motion.

MS. DAVIS: Moving forward, Your Honor, on the issue of advisement, it's our view that regardless of whether the issue's under advisement or not, and we'll get to more of the substantive aspects when we go over our objection, the request of Law Debenture to serve on the committee would be inappropriate at this time and that the U.S. Trustee has in no

way acted contrary to the standard of law articulated in the Barney's case or its progeny that she has abused her discretion or that she has acted in an arbitrary or capricious manner by not making a ruling at this juncture or, if we reach that point, that she's declined the request.

THE COURT: Okay. All right. But she hasn't -- well, obviously she hasn't appointed Law Debenture.

MS. DAVIS: That's right. Your Honor, the facts are this. December 14th the U.S. Trustee sent a letter out to four of the parties who had requested service on the creditors' committee. Those parties were Tyco, PBGC, the union, and Law Debenture.

On the 14th she articulated in that letter that she had declined the request of Tyco, PBGC, and the UAW to serve on the creditors' committee, but that the issue of Law Debenture was still under advisement. And then subsequently Law Debenture filed their pleadings and we responded accordingly.

THE COURT: Okay.

MS. DAVIS: Thank you.

MS. CECCOTTI: Your Honor, I guess that I'm still not clear on the answer to my question as to whether there would be issue preclusion or not under the circumstances.

THE COURT: I don't think directly but you're going to -- I think, that's all.

MS. CECCOTTI: I'm sorry, Your Honor?

THE COURT: ~~That's really~~You=ll learn how I think,

but it won't be directly binding on you. I mean, you can I guess come back a month from now and convince me I should have said something different. Maybe you'll say ——B or maybe the debtor will be trying to convince me, I should have said something different when you apply.

MS. CECCOTTI: Your Honor, with that, I'll cede the podium to the people who are really supposed to be arguing now but I may --

(Laughter.)

MS. CECCOTTI: I may reserve the right, depending on how you think, to try to get a way --

(Laughter.)

MR. ANTOSZYK: All this action, Your Honor, and I haven't said anything yet.

Good afternoon, Your Honor.

THE COURT: But the UAW will be listening closely.

MR. ANTOSZYK: Yes, Your Honor.

Pater Antoszyk, counsel to Law Debenture Trust Company of New York, Your Honor.

Just as a housekeeping matter, there has been a motion to admit me pro hac vice. I don't know if the Court has acted on it yet, but it has been filed.

THE COURT: That's fine. You can proceed.

MR. ANTOSZYK: Your Honor, Law Debenture is the successor indentured trustee and property trustee for the eight-and-a-quarter junior subordinated notes due 2003 and the

adjustable-rate junior subordinated notes due 2003 issued by Delphi Corporation.

The aggregate face amount of the notes is $412 million. We have filed a motion on behalf of Law Debenture Trust Company of New York to change the membership of the official committee and the basis of our motion is that the existing committee and the membership of the existing committee of unsecured creditors does not adequately represent the interests of the subordinated bond holders, and therefore, this Court should order the appointment of Law Debenture to the committee as representative of those interests.

The circumstances leading up to this motion, Your Honor, I think are undisputed, but they are as follows:

These cases, as this Court well knows, were commenced on October 8th of this past year. These cases are very large. They're complex cases and the debtors and the U.S. Trustee both note the cases will involve a lot of moving parts.

The debtors are and will be engaged in divestiture of assets, wind-down of certain U.S. operations, major negotiations with unions which I understand are going on right now, major negotiations with GM governing claims between the parties, and many other matters.

The committee is and will be intimately involved with all of these matters and the outcome of these decisions and many, many others that the committee will consider and make will have a major impact, if not determinative of whether the

subordinated note holders will receive a small, large, or any dividend.

When the debtors filed their cases, they had four general categories of uniquely-positioned creditors. They are the trade, the employee -- what I group together as the employee pension/wage claims, the $2 billion of subordinated notes, and the -- I'm sorry, $2 billion of senior notes and the $412 million of the subordinated notes. It was my claim that there might be additional distinctions in those, but those are sort of the broad categories.

The subordinated bond holders are one of the debtors' single largest unsecured creditor constituencies. That by itself, however, is not what makes the position of the subordinated note holders unique, these would be the other members of the committee.

The subordinated note holders are uniquely situated because they have the dubious distinction of purportedly being the last in line just above equity. They're purportedly contractually subordinated to the senior notes and trade and employee claims pursuant to the terms of the governing indenture. And they are purportedly structurally subordinated to the claims of all other creditors of the subsidiaries because the notes were issued by the corporation.

Because of the inherent subordinated position, the subordinated bond holders are interested in maximizing value beyond just these other senior claim holders. Their interests

are distinct in that nature.

Following commencement of these cases on October 8th, on or about October 20th the U.S. Trustee held a formation meeting and formed a committee of unsecured creditors, as it is required to do under 1102(a)(1) of the bankruptcy code. U.S. Trustee appointed the following creditors to the committee: four trade creditors, which are Electronic Data Systems Corporation, General Electric Corporation, Flextronics International Asia Pacific, and Freescale Semiconductor; one employee union benefit representative, which is the IUECWA; Wilimington Trust Company, which is the indenture trustee for the senior notes and statutory trustee for the subordinated note holders.

However, as we've noted in our papers, its position as statutory trustee is merely ministerial. It can only accept service of process. It doesn't represent the interest of the subordinated note holders and, in fact, they filed a statement in connection with our pleading acknowledging that fact.

And finally, Capital Research and Management Company, which I refer to as "Cap Re" (phonetic), an institutional investor. Cap Re holds, according to submissions that it filed with the Court, $530 million in aggregate debt claims against the estates, of which 500 million is senior notes and only $30 million are the subordinated notes. Thus, the subordinated notes represents less than six percent of the Cap Re's investments in debtors.

So note, in terms of the makeup of the committee, all of the committee members, all seven of them, hold or represent claims that are purportedly senior to the interests of the subordinated note holders. The committee doesn't just proportionally represent such senior claims or any senior relative to the subordinated -- potentially relative to the subordinated note holders, it is dominated by it, if not exclusively representative of such potentially senior claims. None of the current members of the committee hold interests that are first and foremost aligned with the subordinated note holders.

This was immediately evident to Law Debenture and, as trustee for the bonds, it immediately requested -- immediately following the formation meeting submitted a request to the U.S. Trustee to appoint it to the committee. We've attached our correspondence to our papers. We advised the U.S. Trustee time and again that the entire committee consisted of creditors holding claims allegedly senior to the interest of the subordinated bond holders, and therefore, the subordinated bond holders were not adequately represented by the current members of the committee.

Now simultaneously, like Law Debenture, other creditors also sought appointment to the committee, namely Tyco, UAW as you just heard, and the PBGC. In response to Law Debenture's and the other creditors' requests, the U.S. Trustee sought the input of the committee and the debtor. The

committee responded but, frankly, gave the request barely what I would calculate as a very short shrift. Basically, the committee stated that the committee was functioning fine, represented everybody, and the consequence of functioning fine, it represented the interest of all creditors.

Law Debenture concluded that, based upon the rather vague response by the committee for input by the U.S. Trustee, we concluded that they were probably relying upon Capital Research to represent the interest of the subordinated note holders, because we concluded that there were no new holders of subordinated claims. And based upon that, we advised the U.S. Trustee that we thought that because of their dual position and heavily-weighted position in the senior notes, that Capital Research could not adequately represent and was inherently conflicted in its representation of both the senior note holders and the subordinated note holders.

The debtors, on the other hand, took a month to respond to the U.S. Trustee's request for input. Ultimately the debtors supported the request of the UAW and PBGC, but opposed the request of Tyco and Debenture. The debtors took the view that all of the requesting creditors were adequately represented on the committee, but for its own strategic reasons, nonetheless supported the appointment of UAW and PBGC.

With respect to Law Debenture, they stated that Wilmington Trust and Capital Research could adequately represent the interests of the subordinated note holders. As I

indicated, Wilmington Trust could not represent those interests because it didn't have any alignment whatsoever and Capital Research was inherently conflicted.

The request of the petitioning creditors were denied by the U.S. Trustee except Law Debenture, which continued under advisement with the U.S. Trustee. We tried to contact the U.S. Trustee, we tried to get a decision out of it, but a lot of time has gone by since our request was pending, in fact, two months have gone by. And this Court knows better than myself, a lot has happened in this case. So on December 21st, not having received any decision and effectively viewing it as a pocket veto of our request, we filed our motion to seek appointment to the committee. And as I said in our motion, we assert that the committee as a whole is not representative of the subordinated interests and Cap Re in particular cannot adequately represent the interests of the subordinated holders because of its overwhelming holdings in the senior notes.

We also filed a supplemental pleading that noted that Cap Re also held a substantial equity position in General Motors which, on its face, at the time, was a further, in our view, disqualifying factor.

THE COURT: Can I interrupt you for a second? When you say Cap Re holds "X" and Cap Re holds "Y," is it really Cap Re or are they different funds? I know a lot of hedge funds have literally different funds and they make a big deal about the fact that they keep those separate and they have different

duties to the investors in those funds.

MR. ANTOSZYK: I would let Capital Research respond. My understanding, it's one entity, but it's hard -- I'd have to go back and look at the statement in particular.

THE COURT: Okay.

MR. ANTOSZYK: However, I would note in their statement they didn't say -- I don't believe that they said they were held by different entities and they didn't say in the statement filed that, as a consequence of holding in different entities, there was this distinction that they could draw between the two, as they did with their equity position. In their statement they said they had established an informational wall to protect against the conflicts that could arise as a result of their equity position and debt position.

THE COURT: Fine.

MR. ANTOSZYK: So I'm just saying there was no disclosure in that regard.

U.S. Trustee has opposed the appointment to the committee and I took the opposition as a denial of our request. It wasn't clear to me whether, with the colloquy that just occurred with the Court, whether it's a denial or not denial, but it sure looks like a denial in their opposition. They oppose it, as does the committee and the debtors on two basic grounds:

One, the committee adequately represents -- the committee as a whole adequately represents the interests of the

subordinated bond holders because its members generally owe a fiduciary duty to all creditors.

And, two, Capital Research, as holder of subordinated notes, can represent the interests of the subordinated notes, notwithstanding the conflict of interest existing as a result of its simultaneous position to the senior and the sub debt.

As I mentioned, in addition, Wilmington Trust filed a statement and Cap Re filed a statement along the lines I just described to you.

The first sort of gatekeeper issue which you touched upon before I started speaking is the ability of the Court to review the decisions of the U.S. Trustee and the composition of the committee, and more particularly, the adequacy of representation of the committee. And I don't think, Your Honor, that there's any serious question that this Court has the power to review the decision of the U.S. Trustee to determine the adequacy of representation of creditors on the committee.

While Section 1102(a)(1) vests the administrative function of appointing committee members in the U.S. Trustee, this was a change from prior law in 1986 where the court approved the creditors' committee. In 1986 Section 11028), which provided courts could change the composition if committee's membership did not adequately represent the claims and interests of creditors was deleted. This was all done at the time the U.S. Trustee program was put into place. 11028)

was repealed and 105 was enacted at the same time.

Consequently, following that there was some question whether, particularly after the repeal of 11028), the court had the authority to review committee appointment by the U.S. Trustee. However, law courts have since concluded, particularly courts in this circuit, however, and I don't think that any of the objecting parties would necessarily disagree, the bankruptcy courts have the power to review decisions of the U.S. Trustee regarding the composition of the committees to determine whether there's adequate representation.

As stated by Judge Garrity in Barney's cited in our papers, notwithstanding the repeal of 11028), most courts hold that upon timely application the bankruptcy court can review the U.S. Trustee's decisions regarding the size and/or composition of an official committee. This sentiment has been echoed by virtually every bankruptcy court in this district including most recently Judge Gonzalez in Enron.

In Enron Judge Gonzalez, a former U.S. Trustee himself, stated that it stands to reason that the determination of adequate representation is less a legal determination, concluded that was vested with the court.

This view is further supported by the restoration of the explicit provision removed in 1986 of the 2005 bankruptcy amendments the new 11028) -- (a)(4). Our understanding, it's not effective for this case, however, it is indicative of congressional intent. The restoration of this provision is

strong evidence of congressional intent not to eliminate the court's authority to review and change committee composition, particularly given the weight of the party favoring its review.

Although the cases are pretty uniform, I think, in -- with respect to the power of the court to review committee composition, there has been in the past a split of authority undoubtedly with regard to the standard of review. Some courts review it under abuse of discretion standard, which is what the U.S. Trustee and the committee and the debtor would have this Court adopt. Other courts have adopted a de novo standard. Some courts have said, well, it depends on what section you look at, whether it's an exercise under 1102(a)(1) or whether it's under 105 determines whether or not it's a de novo or abuse of discretion.

Our view is that several courts in this jurisdiction have determined that the issue of adequacy of representation -- the issue of adequacy of representation is -- from whatever the remedy might be -- is a de novo determination. That seems to be the weight regarding this circuit. It was adopted by the Texaco case, the Enron case, and several others that we've cited for you in our brief.

It's consistent -- that standard is consistent with the historical rule of the court to be the final arbiter of the adequacy of representation and consistent with congressional intent as previously expressed and as presently expressed under the new code. However, you know, frankly, whether this Court

reviews this under a de novo standard or an abuse-of-discretion standard, we think that the relief requested by us should be awarded by the Court.

Moreover, as noted by numerous courts, part and parcel of the power to review is an inherent power to give a remedy. An inherent power to give a remedy, whether contained in the numbers of 1102(a)(2) or enabled by 105 exists to modify the membership of the committee. And again, this is reinforced by the newest amendments to the code.

So in sum, we believe that this Court has the authority to review de novo, or at least under an abuse-of-discretion standard, the decisions of the U.S. Trustee regarding the composition of the committee and, if necessary, to change its membership to insure adequate representation and address inadequacy of representation.

Now having said that, turning to the substance of our motion, you know, each of the parties lay out basically the same standard when courts are reviewing whether there's adequate representation on a committee and we point to three factors that have been identified by the courts, including the courts in this circuit: The ability of the committee to function, the nature of the case, and the desires of other constituents. Each of those factors militate appointing Law Debenture to the committee.

In this case, the committee states in its opposition, and it also stated in prior letters to the U.S. Trustee, that

the committee is "well-balanced and functioning extremely well." U.S. Trustee accepts these statements as justification of her decision not to appoint Law Debenture to the committee and notes in her opposition in support of the fact that the committee is functioning just fine, that the committee is participating in all aspects of the case. That's in Paragraph 29 of her opposition.

It's understandable that the committee is now accustomed to its current membership and does not want to alter its voting composition, as stated by the committee in its letter to the U.S. Trustee. However, the committee's collegial working relationship and participation in this case does not satisfy the legal requirement, the legal requirement that the committee adequately represent the diverse interests in this case; that is, a collegial active committee doesn't equate to a functioning committee in a sense of adequate representation.

As Judge Gonzalez noted, a proper functioning committee goes beyond that. And he said the problem is that a committee may function just fine, reach a consensus on all issues, and still not adequately represent a particular group, which is exactly the situation we have here. To be properly functioning, a committee must provide meaningful voice to all creditor classes, not all creditors, all creditor classes.

As often stated by courts, and I quote the court in a most recently reported decision, which is the In re: Garden Ridge Corporation case, a 2005 case out of Delaware, which is

2005 Westlaw 523129: "As a general rule, adequate representation exists through a single committee so long as" -- here's the key -- "the diverse interests of the various creditor groups are represented on and have participated in the committee. Further, the creditor groups are adequately represented if the interests of each group have a meaningful voice in the committee relative to their posture in the case," and they cite a series of cases that previously held that.

The U.S. Trustee appears to agree with this standard, as set forth in her opposition, however, while agreeing with this standard, the U.S. Trustee then proceeds, in our view, to ignore it as it pertained to the subordinated notes. And here's the crux of it, I think.

The U.S. Trustee states in opposition that it decided not to appoint Law Debenture to the committee because there is no qualitative difference, in the U.S. Trustee's view, between the claims of the subordinated note holders and all other claims held by the members of the committee. Apparently, in the view of the U.S. Trustee, the subordinated bond holders' claims have unique origin or no unique priority which would distinguish their claims from the claims of the employees, the trade, the union, or even the senior note holders, and entitle them to a distinct representative on the committee.

Instead, the subordinated note holders, in the U.S. Trustee's view, should rely upon the existing committee membership, whose claims are indistinguishable, as far as she

is concerned, from those of the subordinated note holders for representation.

I suspect, Your Honor, that many a subordinated --

THE COURT: Well, she doesn't go -- that's not what she says. She doesn't say they're indistinguishable, she says they're --

MR. ANTOSZYK: She says there's no qualitative difference and I guess you're correct. I've interpreted that to mean that -- what that means when you say "no qualitative difference" is that there's not distinctive characterization -- no distinctive characteristics between the subordinated note holders' position and those of all the other members of the committee. That's how I've interpreted it and if I've misinterpreted, that's fine, but I think that's what I took away from the words "no qualitative difference."

I suspect that, as I said, the subordinated holders wish that were the case.

THE COURT: Is there any evidence that the interest of the subordinated note holders are not being considered actively by the committee? I mean, isn't it your burden to show that, other than just saying that we're different?

MR. ANTOSZYK: Well, no. No. That is a -- and here's --

THE COURT: Particularly given Cap Re?

MR. ANTOSZYK: No, and here's the difference. The committee cites a litany of cases which say if you are alleging

a conflict of interest, you have a burden of showing an actual existing conflict of interest which would be debilitating. Those cases were all removal cases. They were to remove those -- they were removal of creditors from the committee.

There's a difference, I think, between removing a creditor from the committee for an actual conflict of interest and having adequate representation, a meaningful voice on the committee. A creditor that has an actual conflict of interest or is alleged to a conflict of interest and is being removed from the committee doesn't raise the issue of representation necessarily of the entire creditor body or a particular creditor constituency.

In this case, we're alleging that a particular creditor constituency, the subordinated note holders, are not adequately represented, cannot be adequately represented by Cap Re because of it overwhelming interest in the senior notes. It is, by definition, debilitating.

Under what circumstances -- I guess the way we look at it is, under what circumstances would Cap Re put the interest, its very small, less than six percent of its investment, put those interests ahead of the interests of its senior --

THE COURT: I think those investors would be pretty angry if they did.

MR. ANTOSZYK: Yeah, the investors of the senior notes would be --

THE COURT: No, the Cap Re investors. Go ahead.

MR. ANTOSZYK: Well, the investors of Cap Re, if they put the interests of this minor investment ahead of its very significant investment, would be legitimately upset, I agree, which bears on our point. What is Cap Re going to do from a reasonable business person's perspective? What are they logically going to do? And logic tells us that they're going to represent -- they're going to advocate, first and foremost, the position of their largest, by far, investment position, which is in the senior notes, to the detriment of the subordinated note holders.

So let me put it another way. Nobody would debate the fact that if the entire committee was made up of trade creditors, that that wouldn't adequately representative of the creditor constituency. And I don't think anyone would debate if the committee was made up of entirely senior note holders that that would be adequately representative of the creditor constituency.

We're taking the position that the fact that there is -- it's entirely made up of senior -- potentially senior claims, even in regards to Cap Re, which is overrated in that position, that it's not representative of the interests of the subordinated note holders. And in fact, there's one case, it was the Value Merchants case which we cite in our brief, which held that a committee -- that held that a U.S. Trustee abused his discretion for failing to appoint an indenture trustee

representing subordinated note holders to a committee which consisted solely of trade creditors and finance creditors, I believe, in that case. So the Court may -- you have to have this major creditor constituency on the committee. They shouldn't have to -- inherently the court recognized that the mere fiduciary duty of the committee is not sufficient to give a meaningful voice to that creditor constituency.

As I mentioned, Cap Re's interests are debilitating. Their holdings of the senior --

THE COURT: I got that part.

MR. ANTOSZYK: Okay. Now notwithstanding Cap Re's debilitating conflict, U.S. Trustee determined, we think, erroneously that subordinated note holders should take solace in the fact that the members, including -- that all members of the committee, including Cap Re, have been advised of their fiduciary duty and that no one stepped forward to indicate that they cannot exercise that fiduciary duty. And they're apparently relying upon the fact that creditors will step forward and say, we can't sufficiently exercise our fiduciary to represent all creditors in the estate, however, that's not a satisfactory solution. That's not an answer. The problem is either we're represented on the committee or we're not represented on the committee as a major, major constituency.

Our point, Your Honor, is even if an argument could be made that Cap Re could conceivably manage this conflict, which we don't think it could, this issue goes to the heart of

the entire bankruptcy process in this case. It is the integrity of the committee process. Adequate representation of the committee is a fundamental notion. It's designed to balance the delicate representative interests of the various creditor interests and to force the subordinated note holders to rely upon Cap Re, an entity faced with an obvious inherent conflict, undermines the entire fairness of the process.

This is unlike, by the way, many of the other cases in which creditors or creditor representatives seek either additional committees or additional membership on the committees. Many of the cases cited in opposition are those cases in which creditors were already represented on the committee. There were already representatives of the subordinated note holders on the committee and they sought to exercise a degree of leverage in the case, either by having additional representatives on the committee, or a separate committee of just that constituency established. That's not what we're talking about here.

U.S. Trustee and the debtors confuse the issues by advancing arguments that are also red herrings, and I'll just touch upon the other factors briefly. The debtors and the committee state that Law Debenture simply wants to be on the committee to advance its particular agenda. U.S. Trustee echoes this concern, stating their opposition that committees are not designed to provide a speaker's forum for a particular creditor group.

We agree, we do have a particular agenda, and that is to advance and advocate meaningful interest of the subordinated note holders, which we do not believe is the case on the existing committee. The committee ominously notes that, in the end of their opposition, that the appointment of Law Debenture to the committee could have "unfortunate consequences in the case."

Undoubtedly, it will be mildly disruptive. We're going to have to be brought up to speed. We're going to have to begin to participate in the committee, but that's the nature of participating in the committee and having a meaningful voice.

Law Debenture should have been on the committee from the get-go. It has, after all, been seeking appointment since day one and we're only a couple of months into the case, so the disruption can't be that dramatic. Nonetheless, under these circumstances, the forebodiance by the committee should not sway this Court one way or the other.

U.S. Trustee also argues that the subordinated note holders are not disenfranchised, based upon the example given by Judge Gonzalez in Enron. Judge Gonzalez noted that disenfranchisement would occur where a committee is so dominated by one group of creditors that a separate group has virtually no say in a decision-making process. We agree that domination by one group of another group of creditors on a committee would constitute disenfranchisement. If that's the

case, then it must also be true that the exclusion of one creditor class from the committee also constitutes disenfranchisement.

Finally, the U.S. Trustee notes that the subordinated note holders, Law Debenture, is not without alternatives. They could independently file motions, we could participate in the case, but that's no substitute for having the benefit of the committee, partaking in the committee deliberations, have the benefit of the timely information of the committee and the benefit of the committee professionals in the case. So the subordinated note holders should have the same benefits of every other creditor constituency. That argument could be used to (indiscernible) any creditor constituency from the case.

So, Your Honor, all the factors, when considered, we think in favor of appointing Law Debenture to the committee.

THE COURT: Okay.

(Counsel confer.)

MS. DAVIS: Your Honor, Tracy Hope Davis for Deirdre Martini, the U.S. Trustee.

Your Honor, I just really want to point out first and foremost that any issue concerning integrity and the appointment of creditors' committees is very troublesome to our office because the U.S. Trustee takes very seriously appointments of creditors' committees. And as Your Honor is aware, we are integrally involved in every major case that has been filed in this district and the U.S. Trustee has been

involved in the appointment of creditors' committees in those cases. And I would note to Your Honor that there could be no more -- this case could be no more complex than the cases, for instance, Enron, which Your Honor is being asked to consider in deciding whether or not to modify the decision of the U.S. Trustee; the Adelphia case, the WorldCom case, and numerous other cases similar to it. And I'll note that in those cases, requests of this kind for modification of the committee, for appointment of additional committees have been denied.

Your Honor, in this instance the U.S. Trustee has filed an opposition to the request of Law Debenture which seeks an order from this Court compelling its inclusion on the creditors' committee and I just want to highlight the salient points of our pleadings.

I think the most important point is that this case was filed on October 8th, not October 17th, and therefore, in our view, the Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005 and the Section 1102(a)(4), which would suggest that the Court has the authority to modify compositions of committee is inapplicable here. For that reason, Your Honor, we would request that Your Honor adhere to Section 1102 of the bankruptcy code and as well the cases that have sought to identify and resolve issues concerning composition of creditors' committees.

Now taking into consideration Section 11028) of the bankruptcy code, which, as counsel has articulated, was

modified for the purpose of determining that the U.S. Trustee and not the court have the authority to modify creditors' committees. In our view, it just makes clear that composition of the creditors' committee, at least that administrative function, should lie with the U.S. Trustee.

Your Honor, in this case on October 20th the U.S. Trustee appointed an official committee of unsecured creditors and I remember when Ms. Martini stepped away from the podium after appointing the committee -- before appointing the committee, she articulated that everyone would walk away equally unhappy here. She basically said that some people would be happy and others would be unhappy. Clearly, by virtue of the motion that you're dealing with right now, there are some people who are dissatisfied with the U.S. Trustee's decision.

But one thing that can be made clear, Your Honor, is that since the U.S. Trustee appointed this committee, she has been involved on a daily basis, she and her staff, with communicating with, if not creditors, committee counsel, with the debtor, and there is no evidence here that the decision of the U.S. Trustee to compose the committee as it stands was improper, in abuse of discretion or arbitrary and capricious.

For that reason, Your Honor, we -- and for the reason articulated in the cases which, in our view, interpret Section 1102(8) of the bankruptcy code as giving the inherent authority in the U.S. Trustee to carry out the administrative function of

appointing a creditors' committee, we think Your Honor should decline to invoke your authority under 105 to basically modify her decision.

Now if Your Honor is of the view that you should exercise jurisdiction over this matter and should basically reconsider the U.S. Trustee's decision, we think the standard that the Court should entertain would be that that's articulated in the Barney's case, abuse of discretion or whether or not the decision was arbitrary and capricious.

A decision on whether the U.S. Trustee has acted arbitrary and capriciously would have to be based on erroneous conclusions of law. The record in this case, in our view, Your Honor, does not support a finding that the U.S. Trustee's decision was based on an erroneous conclusion of law. In fact, Your Honor, as counsel has conceded, although we disagree on a couple of aspects of this, the U.S. Trustee did appoint a subordinated note holder to the creditors' committee. That would be Cap Re.

Your Honor, in determining that Cap Re -- strike.

Your Honor, when Cap Re had sent a letter to the U.S. Trustee asking the U.S. Trustee to reconsider her decision as to whether or not it should be appointed to the committee, the U.S. Trustee, as is her practice, sent letters to the debtor, to the creditors' committee, and as well that's not what her --

THE COURT: When -- you said "Cap Re." You mean --

MS. DAVIS: Capital Research Management.

THE COURT: You're referring to their letter?

MS. DAVIS: I'm sorry?

THE COURT: I'm sorry. You're referring to their letter?

MS. DAVIS: No, I'm referring to the letter of Law Debenture. Excuse me, Your Honor.

THE COURT: Okay.

MS. DAVIS: When the U.S. Trustee received Law Debenture's letter requesting that they be added to the creditors' committee, the U.S. Trustee sent a letter out to the creditors' committee counsel and as well to the debtor and as well, as is her practice, she continued to render thoughts and as well to consider the facts with respect to their request. Clearly when she issued a December 14th letter, that decision had not yet been made, however, Cap Re filed this motion to circumvent the authority --

THE COURT: You mean Law Debenture?

MS. DAVIS: I'm sorry. I keep saying that. I apologize, Your Honor. Law Debenture.

THE COURT: That's okay.

MS. DAVIS: Cap Re's just on my mind, although they'll have a chance to speak in a moment.

Your Honor, the most important thing to point out is that nowhere in counsel's papers have they made any allegations that the U.S. Trustee acted haphazardly; that she failed to timely address their concerns; that she did not take into

consideration factors that were raised both at the time the case was filed, that Cap Re submitted its initial solicitation ballots, or the information that she was supplied to by debtor's counsel.

THE COURT: Let me ask you --

MS. DAVIS: I said Cap Re again. Pardon me, Law Debenture. They're on my mind.

THE COURT: That's fine. I think what this boils down to is Law Debenture's contention that, notwithstanding the administrative function that Wilmington Trust performs, and the fact that Cap Re does hold subordinated debt, neither of those two entities has any real -- any meaningful interest in serving as a voice for the sub-debt. And one thought that certainly crossed my mind is whether, when the U.S. Trustee was appointing the committee, that possibility was evident.

When you look at Wilmington Trust's list of roles, you can certainly form the view that, contrary to the statement they filed recently, they did have some duties to the sub-debt and could serve as a voice for them. Similarly, Cap Re, when one looks at their holdings, you might initially have taken the view that, you know, they're perfectly able to represent the interest of the sub-debt to the extent the interest of the sub-debt needs to be specifically represented on the committee.

And so my question is, did -- is the -- have the facts, as they've been developed, legitimately surprised the trustee in the sense that, you know, maybe she didn't

appreciate at the time that Wilmington Trust really doesn't have anything to do with the sub-debt, for example?

MS. DAVIS: No, I don't think so, Your Honor. In fact, it was a very long organizational meeting that the U.S. Trustee had. We had numerous meetings with debtor's counsel prior to the organizational meeting. We obtained from the debtor extensive information up to the last moment concerning the breakdown of debt here, concerning the composition of the unsecured creditor body, and the U.S. Trustee took all of that information into consideration in making a decision. In fact, where there was ever an issue of a conflict or a disagreement, the U.S. Trustee actually asked certain parties to come in. There were frequent runnings back and forth between the debtor, between the actual creditor to insure that the U.S. Trustee was taking into consideration all of the breakdowns in the debt, the unsecured debt in this case.

THE COURT: Okay.

MS. DAVIS: So to answer Your Honor's question. It only flows from that, Your Honor, regarding whether or not, in the U.S. Trustee's -- any decision of the U.S. Trustee not to appoint Law Debenture to the committee, whether or not she has taken into consideration representation on the committee.

THE COURT: Well, when you decide whether it should be Law Debenture or someone else, just when you bore it down, how are the interests specifically of the sub-debt represented on the committee?

MS. DAVIS: In our view, Your Honor, they are represented by Cap Re. And, Your Honor, in our view, based upon the responses that were filed by Cap Re, as well as the evidence that's before Your Honor that was before the U.S. Trustee, there cannot be a finding that subordinated note holders are not protected or would not be represented by this committee.

Your Honor, this case is four months old and in the four months this case has been pending, the creditors' committee has had to deal with many substantive issues in this case and we understand there will be many ahead of us, but one of the most important issues, Your Honor, that is going to be before the creditors' committee at some point would be the formulation of a plan of reorganization. And I would submit to Your Honor that at this juncture in the case, there have been no issues that have been presented to the creditors' committee for it to have any belief that Cap Re or any of the other members would breach their fiduciary duties or would have a conflict with respect to determining whether or not there would be adequate value returned to the subordinated note holders, the senior note holders, and to the other creditors in this case.

I think that's very important for Your Honor to consider in determining whether or not there's adequate representation here. Your Honor, one of the most important issues that goes to adequate representation is whether or not

the fiduciary duties of creditors can be satisfied. And as Your Honor can discern from the pleadings that have been filed, I think in support of the U.S. Trustee's objection or consistent with the U.S. Trustee's objection, there isn't any evidence that any of the creditors that are currently serving on the creditors' committee would breach their fiduciary duty to Law Debenture or any of the other creditors here. In fact, Cap Re has gone so far as to communicate with the U.S. Trustee to prepare a -- I would say an information wall, so they are very cognizant and aware of their fiduciary duty to all of the creditors in this case.

THE COURT: The information wall is between the stock holding and the debt holding, correct?

MS. DAVIS: Your Honor, I'm just saying that it's evidence of how serious they take their role in the case and I think that's very important to point out. And that's one of the most crucial points, I think, to raise here.

Your Honor, I think it sets a very bad precedent for a party who is not appointed to a creditors' committee to run to court when they don't get the response they want or as quickly as they want from the U.S. Trustee. I think that, by virtue of this motion itself, the estate has incurred extensive expenses, perhaps unnecessary here, and I think that, at a minimum, the U.S. Trustee should be afforded her right to exercise her administrative function.

And for those reasons, Your Honor, we request that

the Court please decline the -- deny the motion of Law Debenture to serve on the creditors' committee. Thank you.

THE COURT: Okay.

MR. ROSENBERG: Your Honor, I am not going to address the underlying issue here of whether this Court has power to grant the motion or, if so, pursuant to what standard for two reasons. Number one, I suspect that the Court has already decided that issue in its own mind and, number two, more importantly, I think that regardless of what that decision is, the result is the same. Under any one of the three issues, no power, de novo, abuse of discretion, the result is the same, the motion should be denied.

I find that -- I find two real ironies in the Law Debenture position that should be pointed out. Counsel stood up here and articulated at great length as to why, as a subordinated creditor, the position is different, and that I can't help but note that the motion papers very, very carefully preserved the right to take the position that they're not subordinated at all. Well, are they or aren't they?

I would think that given their unique inference to the position on the committee that's being articulated here, at least they would have the judgment of saying, yes, we are indeed subordinate, because if they're not, why are we here?

Number two, to me it's very ironic that in the guise of an argument of representativeness, what we're really hearing parochialism. The committee is not representative of the

parochial position that we want to articulate. And, Your Honor, I think that the entire argument goes against the whole thrust of what a committee is supposed to be and what representativeness actually means.

Now the position is very short on fact and very long on innuendo. The position seems to be that the committee is not capable or desirous of exercising its fiduciary duty to all creditors, including subordinated creditors, if there are any, which, of course, the moving party isn't conceding. There's just no basis in fact for that position and I think it is noteworthy that not once in the many, many important issues that have come up in this case -- I should say not ones that I can think of, just in case I'm corrected -- has Law Debenture filed a pleading that says the position that the committee is taking is wrong or we disagree with it. That hasn't happened, so where is the evidence that the committee is not properly representing all creditors?

Where is the evidence that the committee has ever taken a position that suggests less of maximization of value for all creditors in this case, maximization of value of the estate? And where, finally, is the evidence that Cap Re, with a thirty-million-dollar investment in the subordinated debt, has not fully considered the interests of that debt in the committee deliberations and in the committee decision-making process? The fact that it has another claim? Where's the evidence that it has ever pushed the other claim to the

detriment of the subordinated claim?

And, Your Honor, I'm not even comfortable making that argument because it goes against my first point, which is these are parochial interests and that's not the way a committee is supposed to function anyway. We're talking about value maximization for everybody and there is no evidence that that hasn't been the case in every single one of the committee's deliberations, in every single one of the committee's decision.

But, since it keeps coming up, and since there is so much unfortunate and unfair focus on Cap Re, I'll join the chorus and say where is the evidence that they have ever done anything other than exactly what they should, consistent with their fiduciary duty? For all of those reasons, Your Honor, I think the motion should be denied.

THE COURT: Okay. Thank you.

MR. BUTLER: Your Honor, I was going to try and address three or four basic points and sit down.

First, I agree with Mr. Rosenberg that no matter what standard you apply, de novo, Section 105 as sort of the Hill standard, or any other standard the U.S. Trustee might suggest, that this application ought to be denied under any of those standards.

The debtors happen to believe that the standard that's appropriate here is the sort of Section 105/1102 standard when you look at the case law because we do agree with the movants that Hill, Barney's, and Enron are instructive and

the case law is instructive here. It really is sort of an abuse of discretion, arbitrary and capricious, and we would add a third element, interest of justice, those kinds of approaches and considerations for the Court are, in fact, we think reasonable to consider.

But when you look at this process, I think you have to look at the process that's occurred here. First of all, a creditors' committee is not a Noah's ark. You don't take two of every species, put them on the ark, and close the door and say that's the appropriate creditors' committee. That's not what congress intended, that's not what the statute says. It just isn't what's required here.

What's required is the U.S. Trustee, at least in the (indiscernible) environment, that the U.S. Trustee exercise a process that's reasonable in order to formulate a decision. And, you know, one of the worst-kept secrets in this case is the fact that the debtors believe that the U.S. Trustee should have appointed the UAW and the Pension Benefit Guaranty Corporation to the committee. Everybody in this courtroom I think knows that. We were vocal about it at the organizational meeting. We have been vocal about it throughout the case and we think it's important and we will stand and support the UAW's application next month.

Having said that, I think it's useful to look at Exhibit K to the movant's motion, which they included our letter to the trustee, because I'd like you to ponder the fact,

Your Honor, that the debtors were so, you know, frankly hell-bent on supporting those two major entities, why is it that we would write a letter that went into painstaking detail expressing the debtor's view that the U.S. Trustee did not abuse her discretion and that she did not act in an arbitrary and capricious manner. That would seem to fly in the face of one of our goals in the case.

The reason for it is that she did not and in these cases you have to stand up and say the right thing. And the right thing in these cases, in the process, was -- I got to tell you, because I was a participant in it. It was a painstaking process. The amount of information that Ms. Martini's office asked and Ms. Davis and Ms. Leonard demanded of us over a ten-day period was exhaustive. I mean, it was reams of information and they required analyses. We had many, many telephone conferences where they asked to look at slicing up creditors different ways, looking at different entities, looking at different business lines so they could get an appreciation. They required that the notice go out to many, many more people than would normally be required. It went out in the hundreds. They received over 100 questionnaires back from people with information. They asked us, after they got the questionnaires, dozens of questions and required us to provide additional information to them. They -- I think anyone who attended the organizational meeting on October 17th at the Marriot Marquis, which was a completely-full ballroom with

three or 400 people in it, and a selection process that went on for hours and hours after that, and the kinds of interviews that the U.S. Trustee did of individual creditors, to suggest that the process, even though it did not necessarily address all of the debtor's desires, that the process was arbitrary or capricious or that there was a discretion abuse, there's just not a scintilla of evidence in this record, nor could there be, that that is the case here.

And so it's important when someone raises the question of the integrity of the process, regardless of what our parochial interests in the debtors may be because we think the case would be better if the PBGC and the UAW were on the committee, we need to stand up and say to Your Honor even though we believe that, the fact of the matter is to suggest in any paper that the U.S. Trustee abused her discretion is just completely inappropriate.

The other thing we wanted to indicate here, because I was concerned a little bit about the argument here and the innuendo in the paper, there seems to be a suggestion that the fact that there's a collegial active committee, I think the quote I wrote down was the fact that thee's a collegial active creditors' committee doesn't mean that there's a functioning committee. I'm prepared to get on the stand and give personal testimony, Your Honor, about just how functioning this committee is.

(Laughter.)

THE COURT: I think Mr. Antoszyk's point was that people can ~~either~~ function very smoothly among themselves and maybe even function ~~less~~ best if they just ignore someone who's not on a committee, but then that ~~the~~ committee is not working. And I guess, going back to your Noah's ark, I was actually using the war movie analogy. You know, you have a guy from Brooklyn and a guy from Oklahoma and a guy from LA in the unit.

Isn't there some of that requirement in the adequacy of representation requirement that you actually have a spread of the various constituencies?

MR. BUTLER: Your Honor, in a general matter, but not to a specific parochial point of view. For example, Tyco Electronics filed a request and they're quite right. The kind of trade creditors that they are, there's a whole constituency that are like the Tycos of the world, they don't have any of their own on this committee and they do have some different interests in this case. We have a health business, a medical care business. One of the amount of information that the trustee required of us was to give them a breakdown of the creditors in the medical devices business because it has nothing to do with automotive and we gave that information.

Well, there's no medical supplier who is on the committee right now and they are not even involved in the automotive business and they have very different interests that much of the things that are being decided day-to-day by the debtors and by the creditors' committee in terms of the

business component.

This is a twenty-eight-billion-dollar business with tens of thousands of creditors and I think, Your Honor, to -- and again, I'm not -- a lot has been said about Cap Re and their counsel has been very patient in not getting up and saying anything other than having filed some clarifying statements, but Cap Re is one of the major players in this case because they not only owned these (indiscernible), but they owned a lot of equity and they own -- and they're one of General Motors's largest equity holders and they play in this space in lots of different places and they are very -- someone once said to me that they own fifteen percent of America. You know, they play in lots of spaces and do lots of things, but when they sit on this committee represented by Wachtell, they -- and as co-chair of this committee, we believe that they understand what their fiduciary responsibilities are to all creditors in this estate and they certainly haven't exhibited anything to the debtors ,and we meet with them weekly in terms of conversations, that would suggest that they are in any way not aware of what their fiduciary responsibilities are.

So I just -- I raise these two points, Your Honor, only because the -- people come up and say, gee, I think I should be on the committee for X, Y, and Z. That's fine. Everybody has their perspective. And we have no particular quarrel with Law Debenture, we need to deal with them in this case and other cases and Delphi needs to deal with Law

Debenture and we will deal with them.

And oh, by the way, as an indentured trustee, I have no doubt that as they -- in this case, whether they're on the committee or not, they will be knocking on my door at the end of the case seeking our consent to a substantial contribution application for whatever they perceive their contributions to the case to be. So they'll be as active as they think they need to be in their interests and they will come to us and come to the committee. Sure as we stand here now, I'm telling you it will happen prior to the plan of reorganization being filed to deal with those issues. So we have no quarrel specifically with Law Debenture.

We do have a quarrel with anybody standing up in a case of this complexity and suggesting that there's something wrong with the integrity of the committee process or the integrity of the selection process for the U.S. Trustee or the integrity of the overall administration of these cases because it's easy to say that, but it's damaging to these estates when those assertions are made without any evidence to that effect.

And so we're simply saying, Your Honor, based on just like Tyco had its own special interests which the U.S. Trustee chose not to acknowledge at that point in time, we believe that all the interests of creditors are adequately represented. We would have come up, had we been able to scratch it out, with a slightly different composition of the committee, but we're not the United States Trustee. For this period, the post-1986,

pre-BAPCPA period, congress decided that the United States Trustee got to make these decisions. And oh, by the way, congress had the opportunity when they passed BAPCPA to make this particular provision retroactive or immediately effective, as they did with some other provisions, and they did not, and so I think we know what congressional intent was with respect to these matters, Your Honor.

So we would ask, Your Honor, that the Court, under any standard Your Honor might choose to think is applicable, deny this application.

THE COURT: Okay.

MR. MASON: Does Your Honor want to hear from Cap Re?

THE COURT: Well, is Cap Re like some fund managers that actually manage funds that hold investments in different pots or is it all in one?

MR. MASON: It is in different pots, Your Honor. Standing here today, I don't know if the sub-debt holdings of Cap Re and the senior debt holdings are in different funds --

THE COURT: Or a~~A~~re in the same fund.

MR. MASON: -- but I can tell you that there was one representative on the committee for Cap Re, that's David Daygo (phonetic), who acts on behalf of all of them.

THE COURT: Of all the sub-funds or funds?

MR. MASON: Yes, of all of the sub-funds. He is, as Mr. Butler had indicated and the U.S. Trustee had indicated, he had walled off for purposes of dealing with Delphi, he's walled

off from General Motors -- from Cap Re's interest in General Motor securities.

I would just point out one thing. I don't want to belabor the record and repeat statements of other counsel, but we do take to hear our fiduciary duties. We are a co-chair of the committee. We believe that we're fiduciaries for all creditors so I completely agree with Mr. Rosenberg.

I would just add that, for purposes of seeing who may reflect the views of different creditors, I would add two things. Number one, while our overwhelming interest is in the senior debt from an economic perspective, we do hold $30 million of sub-debt. It's almost ten percent of the sub-debt class and if there's a reason sort of not to give it up, we're not going to just give that up. And when the appropriate time comes, we may, frankly, be advocating for significant recoveries for sub-debt holders.

And number two, both the senior and the subordinated debt holders are holders at the parent-company level, and so in our capacity as a senior debt holder, we can certainly reflect the views of, to the extent it's appropriate, parent company creditors, which may not be the case for other members of the committee. That has not happened yet, but it may happen at some point with regard to negotiations.

THE COURT: Okay. Thank you.

MR. FOX: Just briefly, Your Honor, Edward Fox from Kirkpatrick & Lockhart on behalf of Wilmington Trust Company as

indentured trustee.

Your Honor, we did, as noted, file a statement because we wanted to clarify, not with respect to any confusion we thought that the U.S. Trustee may have had, but with respect to sort of -- Law Debenture's papers may have muddied the waters a little bit. Specifically wanted to reserve our rights with respect to anything they raised on the subordination issues and make clear that our only role with respect to the toppers which hold the subordinated debt is as Delaware statutory trustee. Our only role there is under Delaware law, which is basically to be a place for service of process and to tell the world if we move our office in Delaware that we've moved it.

You asked the question of Ms. Davis as to whether there was any confusion on the part of the U.S. Trustee with respect to (indiscernible). We were asked to meet with the U.S. Trustee in the midst of the formation meeting, and while I don't remember all the questions that we were asked, I do not recall there being any confusion on the U.S. Trustee's part or if, in fact, there was, we would have cleared it up as to specifically what our role was and we certainly would not want anybody to be laboring under the misapprehension that we have any fiduciary duties with respect to the subordinated debt because that's not a space we would want to be in.

THE COURT: So your client didn't make its pitch to get appointed to the committee, among other things, because it

had this role with the sub-debt?

MR. FOX: No, absolutely not. We did indicate that, as I recall, on the form that you fill out for the U.S. Trustee's office because we're required to indicate to them any role that one plays in the case and we want them to be fully advised of those roles, but, no, we could not, under the Trust Indenture Act, have fiduciary duty to both the senior debt and the sub-debt and we would not --

THE COURT: Except as a creditors' committee member to all creditors?

MR. FOX: Yes, that's right. That's right.

With respect to the issues that have been -- some insinuation, if you will, in the Law Debenture papers about valuation issues and you can read those in two ways. One is with respect to maximizing actual value and the other is with respect to deciding in a stock-for-debt type plan how that gets divided up.

As an indentured trustee, and as Mr. Mason pointed out, the senior bonds as well as the subordinated bonds were at the parent level of Delphi Corporation. We have every interest in seeing as much value flow to Delphi Corporation as possible to get those bonds paid par-plus-accrued plus all the outstanding fees. And we certainly wouldn't spike the ball before seeing that happen. And with bonds trading in the fifties at this point, as I understand it, that will be a great place to be.

To the extent that we got to that point, it seems to me that at that point Cap Re would have every incentive to say there's more value here and it all goes to the sub-debt so that they get it all. They would have no incentive, as is suggested in the Law Debenture papers, to, at that point, say, well, let's just leave it on the table for everybody else to share in as opposed to Cap Re and the sub-debt wanting to take it home.

The final point I'd simply make, when it comes to putting the committee together, and this really looks forward to the UAW motion which we've been advised is on next month, is that there is, I'm sure when the U.S. Trustee sits down and puts together a committee, a recognition of the various interests which are being put on the committee and when you push in one place, it has an effect in another place. At this point, we have a committee with four trade, one union, and two bond holder representatives. To the extent we're dealing with Law Debenture this month and UAW next month, if they're taken seriatim -- and who knows, maybe PBGC will or won't jump into that fray, I don't know -- but if they're taken seriatim, there's always a concern that it pushes a committee that might be balanced in a particular way out of balance or more in one direction than another. Representing the interests of bond holders and senior debt, we're always interested in seeing more bond holder representation rather than less or seeing that increase rather than decrease, so we keep that in mind as well.

THE COURT: Okay.

MR. ANTOSZYK: Your Honor, I think you aptly stated our point, which was it's not sufficient to have Cap Re as the sole representative of the subordinated note holders. They are not in a position, in our view, to inherently be able to represent -- adequately represent the interests of the subordinated note holders.

I just want to address briefly some of the comments with regard to process. We don't doubt that the U.S. Trustee went through a painstaking process. We don't doubt that the U.S. Trustee took her role and function very seriously. We just dispute whether she got it right and, in our view, she didn't, so it's not as if we are impinging upon the integrity of the process necessarily, as opposed to the result.

And in that regard, the result is very different than what Mr. Butler indicated may be for other creditors. There's a big difference, I think, between a creditor, a general unsecured creditor that is of a different industry but is yet still a general -- of the same priority and ones that perhaps occupy different levels, different priorities. And in that instance, I think there's a defining difference and if you look at some of the cases, courts have -- cases in which there have been subordinated note holders where there has been appointment of separate -- where the issue has been a separate committee or additional members, there's always been representatives of this junior class, representatives that are independent, representatives that can give a meaningful voice, which we

don't think exists in this case.

So in terms of evidence of a conflict, Your Honor, the evidence, we think, is inherent in the nature of the relationship and we don't think anything further needs to be proven. And for that reason we think that our motion should be allowed.

THE COURT: Okay. I have in front of me a motion by Law Debenture Trust Company of New York, the indentured trustee for a substantial issue of subordinated debt at the ~~joint~~parent-company level at Delphi to alter the composition of the official creditors' committee so that it is appointed to that committee.

The ~~bankruptcy~~ Bankruptcy ~~code~~Code, as applicable in this case, which is the pre-BAPCPA version of the code, authorizes the United States Trustee to appoint an official committee and also authorizes the trustee to appoint or remove members of an official committee. See In re: America West Airlines, 142 BR 901, 902, Bankruptcy Arizona (1992). Now, that can continue during the course of a case. See In re: Heydar Leasing International Company [Ph.] at 11 BR 460, 461, Bankruptcy SDNY (1981).

The official committee's composition also may vary from case to case, that is, Section 1102(b) serves only as a guideline for committee composition ~~which~~thus, although she must be generally cognizant of the various classes of interest at stake in the ~~committee~~ creditor body -- in the unsecured

creditor body, excuse me -- the U.S. Trustee and the Court to the extent the Court supervises the U.S. Trustee's decision, also needs to take into account the particular issues involved in the particular Chapter 11 case, which may significantly differ from case to case. Some cases involve serious business issues. Some cases involve inter-company issues. Some cases involve inter-creditor issues at one level or more in the capital structure, and the like. See In re: Drexel Burnham Lambert Group, Inc., 118 BF 209 at 212, Bankruptcy SDNY (1990).

As the parties have noted, the case law is not particularly clear as to whether and under what circumstances the bankruptcy ~~Court~~ court may change the composition of a committee or, going further than that, order the appointment of ~~an additional~~ specific ~~member~~ entity to a committee. As ~~the movant here~~Law Debenture has ~~as~~ correctly stated, however, the case law is clear, although the statute is not clear itself, that the Court does have some ability to at least determine that the committee as presently composed does not adequately represent the interest of the unsecured-creditor body.

Given the statutory charge to the U.S. Trustee to appoint the committee, I believe that the Barney's line of cases, and that's In re: Barney's, Inc., 197 BR 431, Bankruptcy SDNY (1996), is probably the right line to follow, as to the standard by which the court should review the issue. ~~in that the court's review of the issue,~~ That is, at least as to whether a particular member should be appointed to a

committee, the trustee=s decision should be reviewed on an abuse-of-discretion basis, ~~again,~~ given the trustee's administrative function in deciding which individual member should serve on a committee~~,~~. ~~it~~ It may be that there's a broader right to disagree with the U.S. Trustee with regard to whether a committee as a whole adequately represents the interests of all the unsecured creditors~~. B~~, but even there, I believe that, as a practical matter, in the interest of justice, the Court should be deferential to the trustee's decision, particularly where it appears, as it does here, that the trustee ~~committed~~ conducted a thorough and extensive analysis of the creditor body and the nature of the case and selected a committee in light of that analysis.

In essence, the movant's point here is that, as a sub-debt holder representative, its voice is necessary on the committee to give adequate representation to a class that must be represented on the committee, and there is support in the case law for that view, for example, see In re: McLain Industries, Inc., 70 BR 852, as well as the Garden Ridge case cited by Mr. Antoszyk in oral argument for the proposition that the issue of adequate representation going into the ability of the committee to function focuses in large part on whether the members selected to serve on the committee represent the creditor constituency, which often breaks down into the different classes of debt asserted against the debtor. And despite the reservation of rights by Mr. Antoszyk's client,

it's clear to me that they're wearing a sub-debt hat until proven otherwise, so I think that ~~that~~ sub-debt distinction is a meaningful one here, at least until proven otherwise.

The responses to some extent acknowledge that requirement of adequate representation under the law, that is that the committee needs to be diversely representative to properly function, so that it is giving a meaningful voice to all classes. However, the objectants also appropriately note that there are limitations to that principle. I believe those limitations apply here for a number of reasons.

First, there is a significant sub-debt holder serving on the committee for the, Cap Re, which holds, through one or more of its funds, approximately ten percent of the subordinated debt claims.

Second, because both Cap Re and Wilmington Trust, which represents at least a voice on the committee senior debt holders, are both representatives of indebtedness at the parent-company level. And when considering many, ~~if not~~perhaps the majority, of the decisions made by the committee in this particular case, it appears to me that the need to have a voice that the movant here is asserting is, more importantly, one that represents ~~the current committee~~the interests of the parent company in considering all of the difficult business issues that these debtors need to evaluate and consider with the committee's help, rather than inter-creditor issues at the ~~current~~ parent level.

So I believe that, in light of those two facts and my conclusion that the trustee was not confused into a belief that Wilmington Trust~~, in some other reason,~~ might be speaking for the sub-debt class, which I had initially been concerned about when I read the papers, I think that the trustee acted appropriately in forming the committee and that the committee does adequately represent the interests of all the unsecured creditors, including the sub-debt.

I say that even though I recognize a tension in the ~~bankruptcy~~ Bankruptcy ~~code~~ Code between the fact that all committee members obviously are fiduciaries for all unsecured creditors and not just their particular constituency and the contrary fact that congress did clearly contemplate having individual voices on the committee for different constituencies. ~~They're~~ These are not at all necessarily tensions that can't be harmonized and they are harmonized, on a properly-functioning committee and I do not believe that there's sufficient evidence here to show that this committee cannot harmonize those tensions in the interest of all the unsecured creditors, including the sub-debt holders.

Just a couple more points. ~~When I was (indiscernible)~~Notwithstanding the fact that the sub-debt trustee is not a part of the committee, it will have, obviously, a meaningful role in this case; that is, it will not be in the trenches on every issue as the committee is~~.~~, ~~Nevertheless~~nevertheless, it will have, I'm sure, an active

role in the case and will, in addition, have access to information from the debtor under 7047 as incorporated in 1106 and 1007. And I believe, notwithstanding that BAPCPA was enacted after this case commenced, it will also have a right to information from the committee, and I would be very surprised and, frankly, upset if it ~~came~~ comes to the time for negotiation of inter-creditor issues at the parent level ~~that~~ and the indenture~~d~~ trustee for the sub-debt ~~would be~~is frozen out of negotiations. That would be, in my mind, completely contrary to how I would view a committee functioning and how I view this committee with its particular professionals would function. So I believe that ~~its~~ Law Debenture=s particular issues will be dealt with and that it will have the type of access necessary to deal with those issues.

Next to last, I would have some real reservations, even if I were to find that the committee generally ~~does~~ did not adequately include a representative of the sub-debt, which of course I ~~don't~~ did not find, I'd have some real reservations even if I were contrary on that issue in appointing this indenture~~d~~ trustee to the committee because of ~~the~~ its apparent view as stated by Mr. Antoszyk in oral argument that Law Debenture would be on the committee solely to represent the interests of the sub-debt holders. I don't believe that is appropriate for a committee member. Committee members are certainly entitled and expected to ~~give~~ deliver their particular constituency=s, if you will, view on ~~that~~issues, but

ultimately they have to act in the interests of all unsecured creditors, and so even if I were to say that the U.S. Trustee should expand the committee to include a sub-debt holder in addition to Cap Re, I would have some real reservations in directing that the particular movant here be appointed.

The last point is -- addresses something that Mr. Fox said, which is that rather than hear this motion and the UAW's motion at the same time, I've heard them or I will hear them seriatim, if I do hear the UAW motion. Let me be clear. I'm ruling on this motion in a particular context. If for some reason the composition of the committee changes, the U.S. Trustee may well decide to change it in more than one way, and I don't think that anyone should look at this ruling as other than a ruling in this particular context, which is responding to the committee as currently constituted and a request to add ~~the~~ Law Debenture ~~trustee~~ to that committee.

So for those reasons I'll deny the request. And I guess, Mr. Butler, you should submit an order.

MR. BUTLER: We will, Your Honor.

THE COURT: Okay. Are people getting faint with hunger? After lunch or do you want to do this now?

(Counsel confer.)

MR. COFFEY: I'll try to be brief, Your Honor, on this matter.

THE COURT: All right.

MR. BUTLER: The last matter, Your Honor, we have two

matters on the agenda, Matter 37 and Matter 38. Matter 38 has been withdrawn.

THE COURT: Okay. That makes ~~it~~ it easy-- all right.

MR. BUTLER: So that was the Charles Clark matter relief from automatic stay, Docket No. 1625. It's been withdrawn.

THE COURT: Can I make a suggestion on the discovery matter with the -- based on, among other things, on Mr. Butler's discussion at the beginning of the agenda about how that matter is still under active discussion with the committee, and then perhaps others, and we're only going forward with one small aspect of it, does it really make sense to deal with this discovery issue now or should we wait until you're further along? Because you may be trying to take discovery on something that's completely different than what the debtors are actually going to present.

MR. ~~BUTLER~~COFFEY: If I may, Your Honor, I think we should deal with it today. It's like being a little bit pregnant. They're talking about paying some people a little money as opposed to --

THE COURT: So your discovery would be focused on what they're doing next week -- or not next week, next hearing.

MR. BUTLER: On the 27th.

THE COURT: Right.

MR. ~~BUTLER~~COFFEE: It really goes to eligibility so if I may.

THE COURT: That's fine.

MR. ~~BUTLER~~COFFEY: Okay. Thank you.

MR. COFFEY: Good afternoon, Your Honor. John Coffey from Bernstein, Litowitz, Berger & Grossmann. I'm one of the co-lead counsel for the four institutional investors that have been appointed to represent the (indiscernible) class and the securities class action. My particular client is the Mississippi Public Employees Reliance System.

Your Honor, shortly after the debtors filed their key employee compensation plan motion, the lead plaintiffs objected on several grounds. I won't reiterate all of them now, but among other things, we pointed out that there seemed to be an absence of any consideration of whether intended beneficiaries of the plan might have participate in the accounting improprieties, tolerated it, or knew of it and turned the other way.

And in addition to making that general observation, we laid out fifteen specific people by name that our investigation had showed had either participated in the fraud, knew of it, tolerated it, et cetera.

THE COURT: Let me stop. Mr. Butler, are any of those people covered by what's going to be heard in a couple weeks?

MR. BUTLER: Yes, Your Honor. They're part of the (indiscernible). Under Mr. Coffey's theory, every executive at the company played some role in this and we've got a lot to say

about that when their turn comes around.

MR. ROSENBERG: Your Honor, with due respect, we haven't negotiated what's going to be heard in a couple weeks, if it's ready to be heard in a couple weeks. I'm not suggesting Mr. Butler was wrong, but I don't know how he can know he's right.

THE COURT: Okay.

MR. BUTLER: I actually am good at that, Your Honor.

(Laughter.)

MR. COFFEY: Well, Your Honor, I do note that whatever those negotiations are, Your Honor, we're not privy to those.

But shortly after we filed an objection, document requests were served and I'd just like to read from some of the document requests. All documents -- I'll paraphrase, but all documents concerning whether Delphi executives knowingly participated in a massive accounting fraud or tolerated or ignored the fraud, documents concerning sham transactions, inventory manipulating, book cooking; documents concerning how Delphi senior executives routinely set inventory target levels; how they engaged in purportedly fraudulent conduct or willful disobedience; and then documents about the four people who are specifically identified, the only four, as to how they were involved in the fraudulent practices. And then with regard to the fifteen people that we identified in our objection, all documents concerning their alleged improprieties.

Your Honor, here's what's interesting about those document requests. They were served by the debtors. They were served by the debtors on December 5th before we ever served any discovery request in this. That's what is one of the most distinguishable facts between this and what you've heard earlier today.

Now after we got these discovery requests, we certainly thought they were relevant and we were glad that they thought it was relevant because we assumed that the discovery requests were not offered to harass, not offered because they thought they were doing an end run around any stay, but because they thought it was relevant to the hearing. So we promptly said we would agree to produce all non-privileged documents and, Your Honor, we have. They have -- they essentially asked us to empty our files on this. They have those documents.

After they served us, we served them and I'd like to break our request into two pieces. One is the mirror image of what they have served on us and which we have responded to them. The other piece identified missing pieces, for example, who's covered. They don't say, other than the bands and the four people at the top. What process, if any, was used to get whether anyone was involved in the fraud?

Now I heard Mr. Butler say, and I was quite astonished, that the fraud -- the accounting improprieties had nothing to do with the bankruptcy. Well, I might take the view it had everything to do with the bankruptcy. The death watch

for this company began after they announced the restatement. I suspect it's probably somewhere in between, but it's certainly not no factor.

The restatement in this case, Your Honor, is larger than the restatement in Enron. You have sixteen of your executives fired or forced out this year. You have the U.S. Attorney's office investigating. You have the SEC investigation. We know because we're talking to them. They liked our complaint and they've asked for our help and they're getting it. And you have a serious accounting scandal that could not have been accomplished by the six people they asked to leave.

As our papers show, there was a pervasive culture of manipulating the books. Now they may argue on the 27th that, you know, we really need those people even though they were crooked in the past or they did something bad in the past, but that's not what they're saying. They're saying we shouldn't even look, that we should just trust them to decide who should get a bonus even though, in our view, there are any number of people who were involved in the accounting improprieties.

Now they did decide that they would produce some documents relating to the (indiscernible) but before they would let us look at what they had decided to produce, they insisted we sign a confidentiality letter. We got it, we looked at it, we signed it without the slightest modification.

We then were allowed access to a website which had a

few documents that essentially showed how they arrived at how much they would pay for the bonuses, but said nothing about whether any vetting had been done whatsoever to insure that you don't approve a plan that puts money in the pockets of people who participated in the accounting improprieties.

We then got their formal objections, we had a meet-and-confer that failed. We couldn't even get them to acknowledge that any documents existed or who was covered, hence this motion.

Now the motion essentially -- I'll deal with the first three points of the four points dealt with in our papers.

As they have done in papers pertaining to motions addressed earlier today, they said this is never to evade the PSLRA (sic) stay and the bankruptcy stay.

If the proposition is it is inappropriate to ask for these types of documents, you cannot square their position with their conduct. They served discovery on us. We responded. Then they say, "Wait a minute."

THE COURT: Well, we can get beyond it.

I've already said that notwithstanding the federal act, if you're entitled to discovery in a bankruptcy case you can get it.

MR. COFFEY: I agree, Your Honor, and in fact we will certainly make the point to Judge Rosen in Michigan that they have in effect already violated the PSLRA because they now have our files and are taking the position that we can't get

their files but that's a separate --

THE COURT: Well, I'm not dealing with that.

MR. COFFEY: I heard you loud and clear on that, Your Honor.

THE COURT: But I guess they have a right to -- they were responding to the allegations you made in your objection, right, to the KEYSIP (sic) motion?

MR. COFFEY: Yes, indeed, Your Honor.

THE COURT: All right. Okay.

MR. COFFEY: And they have those documents.

THE COURT: All right.

MR. COFFEY: If the position is it's not relevant why were they serving such discovery and we responded, they have our documents, but so the idea that there's a stay that bars us from getting it -- in other words, they think it's unilateral, not mutual -- they are entitled to get documents from us --

THE COURT: All right, we're beyond that.

MR. COFFEY: Very well, Your Honor.

With regard to the relevance, we think it's highly relevant. We think it's highly relevant.

Does the Court want to be in the position on the 27th of approving a plan that may put money in any of the pockets of the fifteen people we've identified and the other people who we believe were involved without knowing that the company did something about it? Did they check it out?

This is different. I was involved in Worldcom and I

won't revisit what I think would have helped Your Honor on that particular motion but unlike Worldcom, unlike Health South where I'm involved as well, the companies clean house and then built a foundation to build an honest company going forward. That's not what's happened here. They cite to you the fact that 25 people left since the beginning of the year. Why do they cite that to you? They want Your Honor to believe, "We need to get this incentive program in place because we're losing people." We said, "Well, aren't like six or eight of those people who were fired because of the accounting fraud?" They won't answer that. Well, isn't that answer relevant if they're telling you the number 25 is important? Wouldn't it be important to you to know, well, how many of those 25 were fired?

So that's what we are trying to get. They won't give us anything.

Now, they also talk about privacy -- very briefly. We signed the confidentiality order they proposed. During the meet and confer when they said it's not adequate, I said, "Give us one that you think is, we'll consider it." We've never gotten one but now what we've heard for the first time on their opposition papers to the motion to compel -- we didn't hear it during the meet and confer -- is, "Well, we might have some morale problems; certain people getting paid more than others." Your Honor, we can do it for attorneys eyes only, that's routinely done, it's not unusual or we can say, "Give us the

names. Who is getting this? Is it John Sheehan?" John Sheehan is a defendant in our case. He was head of accounting during one of the largest accounting frauds of our time. That is not an exaggeration. It is bigger than Enron. He's the head of restructuring. I assume he's going to get a bonus. Has there been any investigation about what he was doing while the books were being cooked under his watch?

So we would respectfully submit before the estate starts paying these people, some sort of investigation needs to be done.

Now, I want to say a word about my former partner and friend, Bob Rosenberg, on the creditors committee. They haven't raised this objection but, Your Honor, rather than -- we are uniquely positioned to raise this. We had been on the case for months. We have investigators, we have been talking to people, we have a case involving these accounting allegations. So my client, for example, Mississippi, says, "What do you mean they're going to pay these people?" We wouldn't be here by the way if they hadn't filed a KEYSIP that showed no indication that they took into account what happened before. If they had done that we wouldn't be here. But they did do that and that's why we're here.

So, Your Honor, we respectfully submit that in order to allow you to evaluate whether the KEYSIP is a sound exercise of business judgment, that you would have to have more facts than this in order to do that and what we've asked for are

documents that were considered with regard to any links between the intended beneficiaries and the accounting improprieties, any conclusions there might have been, documents relating to sham sales. There was a $200 million sham transacted at the end of December 2000 so that Delphi could announce, fraudulently, that they made a revenue number. Laura Marion [Ph.], who we want to depose, was the head of accounting for financial reporting, she reopened the books -- so we have been told -- allowed that sham transaction to be brought and they made their numbers. That's been restated by the way. That's admitted by the company. Is she going to get a bonus? We'd like to ask her about it. We'd like documents as to why the 25 executives left and we'd like to depose, as I mentioned, the four people in our papers including Mr. Sheehan, who they admit was involved in developing the KEYSIP.

The question on the 27th, Your Honor, will be will the KEYSIP benefit anyone who participated in, tolerated or turned a blind eye to the accounting improprieties. There is no evidence that they've done anything on that and this motion is brought because they want to keep it that way and, Your Honor, we believe the relief we've requested is the minimum necessary to insure that if the KEYSIP is approved that the Court has been adequately informed of all of the relevant facts and circumstances.

Thank you.

MR. BUTLER: Your Honor, this motion represents the

trifecta for the day of lead plaintiff's efforts to try to gather information about the original accounting fraud for a separate agenda. I mean if you actually look at the details -- and it's useful to look at the details, we've tried to outline some of them in our response -- what they are trying to do is use what is the only thing before the Court now on the 27th of January which is an annual incentive program for performance from the period that ends June 30, 2006, a position I will tell you I think as constructed is ordinary course. We're still going to negotiate with the creditors committee but that's all that's before you. The emergence (sic) program has been put off until July as we continue to negotiate with the compensation consultants and with the committee.

Let me just take a step back -- and Mr. Coffey obviously feels otherwise and wants the Court to sort of believe otherwise -- but the debtors do not believe that we have any wrongdoers that should leave Delphi working at Delphi today. If the board of directors of the company or the executive managers of the company believed that we had wrongdoers that had breached their fiduciary responsibilities to the company and should not be at the company they would not be there and the fact of the matter is the executive management team we have at the company now which is led mostly by new people -- but the reality is we have a new general counsel, we have a new CEO, we have a new CFO, we have a number of other new people that are coming, we have a new director of audit, we

have lots of new people at the company -- but the fact of the matter is the people who are at the company, the company believes in and believes that they should be compensated and just to make the point, they're being paid right now, they're being compensated now as we sit here, and to suggest that somehow the fact that we want to provide an ordinary course annual incentive plan -- which is al that's up before you on January 27th -- that somehow that program is going to somehow give the license to go back and get the following kinds of things. They would like to have every document that exists with respect to financing transactions totaling approximately $441 million reported by the debtors as sales of inventory or direct materials as described in detail in lead plaintiff's consolidated class action complaint at Paragraphs 122 to 54. Example 2, they want all the documents that exist on transactions totaling more than $240 million between the debtors and General Motors Corporation as set forth in the complaint -- their class action complaint -- in Sections 155 to 168. They would like to have all of the transactions between the debtors and various service provides including $68 million in transactions with Electronic Data Systems or the debtors' information technology providers as described in the complaint from Paragraph 173 to 184 and they go on and on and on.

They've asked for copies of all documents that relate to any former Delphi executive who knowingly participated in Delphi's massive accounting fraud and the list goes on and on.

We put it all in our response. I'm not going to go through it.

How are those relevant and how do those relate to whether or not the Court approves an incentive plan for performance through the period ended June 30, 2006? Your Honor, they're using this as a fishing expedition and as a license --

THE COURT: What is the initial period? What is the start of that period?

MR. BUTLER: The proposed start of it is October 8th when we filed in 2005 through June 30, 2006. We're negotiating the exact parameters of that with the creditors committee and we will deal with that issue in our negotiations with them but it is for the post-petition period only.

Your Honor, when you actually read their voluminous requests, those requests are clearly designed to have an agenda so they can get information to buttress their other case. It has nothing to do with whether or not we've demonstrated reasonable business judgment in having a program and by the way, it also doesn't prevent them from coming to argue at that hearing without having conducted another investigation that they think they're "uniquely" qualified to conduct for them to argue that somehow there should be some curtailance put into the program to address issues they're concerned about.

The debtors start from the proposition, Your Honor, unlike Mr. Coffey, that we do not believe that there are

currently wrongdoers at this Chapter 11 debtor operating the company.

THE COURT: Well, but let's play that out.

If they come to the hearing and say, "We have the following evidence that we've already discovered through other means that Mr. X and Ms. Y shouldn't get this because they're going to end up owing the debtor more," aren't you going to say, "Well, we disagree with that@ and ~~they~~ to put on a case to say that, you know, there's no such claim?" Or are you just going to let them say that and you'll say, "Well, Judge, you should just consider that for what it's worth?" I mean if you're going to put on a case in opposition to them why shouldn't they take discovery on it?

MR. BUTLER: We don't intend to put on a case on January 27th about the accounting fraud dating back to --

THE COURT: No, I understand.

MR. BUTLER: Which is what they're asking for discovery on.

THE COURT: But if the plaintiffs say you shouldn't approve this with regard to, you know, Messrs. X, Y and Z because "we have good reason to believe" -- and they say what they know -- "they were involved in an accounting fraud and hurt the company and creditors" -- unless the debtors are not going to respond to that, I don't see why they wouldn't be entitled to discovery as to what your response would be.

MR. BUTLER: But our response, Your Honor, I think --

I mean part of it -- and I'm a little concerned that the Court is to a certain extent in some respects buying into their view of what the standard is at a KEYSIP hearing.

They're basically saying -- they're taking the position that if anybody in their opinion turned a blind eye --

THE COURT: No, no, no, it's not in their opinion. I mean they're saying what it is and basically throwing the ball back on the debtor unless the debtor is going to say, "Well, we disagree and we rest," they may win. So I mean if I were in your shoes I may want to say, "Well, they're wrong. Mr. X wasn't involved in this at all" and there are other things you can do. You can say that it ought to be held in escrow or something until these issues are decided but other than putting off the issue, I don't see how you can oppose them on the merits of that claim without giving them discovery.

MR. BUTLER: But actually, Your Honor, because I believe that the basic claim is faulty --

THE COURT: You believe that but they differ with you. They=ve said they have ~~the~~ an issue ~~(sic)~~.

MR. BUTLER: Your Honor, let me try and approach this a different way.

Mr. Coffey alleges that someone who is currently at the company did bad things for five years and should never bet paid another dollar from the company.

THE COURT: Right.

MR. BUTLER: Okay.

I did not intend on January 27th to put on a case about what happened in 1999, 2000, 2001, 2002 --

THE COURT: In response to what he's saying.

MR. BUTLER: Right.

I do intend to say, however, that I don't think he can show under all the KEYSIP case law in this country that those allegations, unproven -- in this country, people are innocent until proven guilty -- that because somebody --

THE COURT: Well, he can go ahead and try to prove it at the hearing.

MR. BUTLER: But that's not the place for the hearing, Your Honor.

THE COURT: Why? I don't understand that.

I'm just going to use -- no, I won't even use a real person -- but you know that there have been numerous CEOs of bankrupt companies who have ended up having either serious liability or ~~being in~~going to jail for securities or accounting fraud. There have been others who have been acquitted. Well, I would find it very hard to approve any sort of bonus plan for an executive who, I felt, was going to jail. I don't care how valuable he was. That doesn't seem right to me.

MR. BUTLER: Your Honor, when does the bankruptcy court, a civil equity court, get involved in adjudicating that when there's no indictment out?

THE COURT: Oh, no, I understand that. I understand that, but it seems to me as a matter of business judgment that

you don't give bonuses to people who you're going to be seeking millions, perhaps hundreds of millions of dollars later from.

I'm not saying -- this is all a matter of proof and discovery and I don't really particularly want this to become a litigation festival. I don't think that's particularly appropriate, but I think that the plaintiffs have raised legitimate issues here as to what process the company has gone through to determine whether ~~(a)~~ someone here, even if they worked really hard for the next nine months and make a lot of money for the debtor, might ultimately be -- you know, there's a good chance that they might really be liable here.

I don't know how I could approve a program where there hasn't been some analysis of that fact.

MR. BUTLER: Of what fact, Your Honor?

THE COURT: Not fact, an analysis of that issue.

MR. BUTLER: We have a bald, unsupported allegation --

THE COURT: But it's not --

MR. BUTLER: I mean I'm pushing back, Your Honor, because --

THE COURT: Well, I assume you asked them for their discovery to see whether ~~their~~ Rule 11 was satisfied. Right?

MR. BUTLER: Right.

THE COURT: But I assume that they believe they did satisfy Rule 11 and given the restatement and given the investigations that are going on there may be some basis to

this. I don't know whether it involves current employees or not, I don't know whether it involves employees who are getting bonuses or not. They don't know either, they say.

So it just seems to me that contemplating the hearing down the road -- and I appreciate that the issue to be heard later this month is a much narrower issue then had originally been teed up some months ago and maybe it's less of an issue but I still see serious, legitimate concerns being raised that unless the debtor just wants to say, "Well, Judge, we think that's irrelevant" and sit down, in which case I have to decide whether it's relevant or not and, of course, then you'll be hearing all these allegations that I'm sure you're going to stand up and say, "that's not true, that's not true, that's not true," I think you have to draw some line somewhere to give them some access and maybe it is just to a vetting process and to ~~whose~~ who=s covered because they say they have a lot of information already and maybe the issue is moot as to a lot of these people because maybe they're not being covered, the ones that they think are implicated in this.

On the other hand, maybe you know enough to say that this has been adequately considered.

MR. BUTLER: Your Honor, what they're attempting to do is to use a hearing to determine an annual incentive plan and even, frankly, an emergence plan. I can address the emergence plans later. They're seeking to use that as an opportunity to try to take discovery and then litigate in this

Court at a KEYSIP hearing about what happened in 2000.

THE COURT: I understand.

Well, I understand that and I am inclined to severely limit the discovery and the extent of the litigation that they want to conduct because to some extent I agree with you it's transparent and it's a sideshow.

On the other hand, unlike the other discovery issues addressed today, I think that, fundamentally, they are seeking things here that are relevant because I have a very hard time -- - given the allegations that they've raised which are serious and I assume that they've satisfied Rule 11 and you'll tell me if they haven't -- that I would have a hard time if a particular employee was implicated in those allegations in awarding a bonus without at least saying you've to got escrow it.

MR. BUTLER: I want to play that out.

That has the effect for a Chapter 11 debtor of saying that if people make claims against Chapter 11 debtor's employees and we need to keep a workforce going forward and the debtors believed we've separated the people that were actual wrongdoers --

THE COURT: But then I'm saying you're not letting them take discovery as to your process for separating the wrongdoers and apparently you're not going to tell me that either at the hearing. I don't see how you can expect me to just take it on faith that that's what's happened.

MR. BUTLER: Your Honor, we did not expect that an incentive plan motion was going to be used by parties in the case or by the Court as, frankly, an approach to try to evaluate what occurred over an historic period.

THE COURT: Well, all right.

I will use an example. All right?

I don't think that I would have approved an incentive plan for Mr. Fastow, even if he was still working and making money for Enron and valuable for Enron. I just wouldn't have done it.

Now, I'm not saying that anyone who worked for this company is like Mr. Fastow at all. But they're raising the issue and I think it's a legitimate issue.

MR. BUTLER: Well, Your Honor, if the question is a narrow question which is what is the process or consideration that the company gave, for example, to make sure that our annual incentive program payments don't go to crooks?

THE COURT: Yes.

MR. BUTLER: That narrow question is a question that we could give discovery on and talk about. That is not -- if you look at their motion, that's not what their motion was.

THE COURT: No, I understand that but you note that if counsel wasn't -- the list of things that he went through in oral argument -- and usually when people deal with discovery in front of the judge they get down to brass ~~tax~~ tacks -- was who is covered, which he is willing to do pursuant to an attorneys

eyes only so you don't reveal to each employee what each other employee is getting; what process was used to determine if anyone was involved in the alleged fraud and why did the 25 leave? Is there really a mass exodus here or did the 25 leave because, you know, fifteen of them were told to leave and ten of them decided that they'd rather go work for GM or Toyota or something?

MR. BUTLER: Your Honor, we can give discovery on that point.

Let's take that point, for example. I don't know how in the world that particular question has any relevance on whether or not we have an annual incentive program.

THE COURT: Well, I think it has a great deal of relevance.

One of the reasons you give people incentive programs is to avoid people leaving. In fact, that's what's in the new Code which, obviously, is inapplicable here but it's a major factor.

If you're having a mass exodus then, you know, one of the things people do is pay people to stay. If the 25 people or however many people that are going to be asserted at the hearing have already left, if actually a lot of them left because they were fired or basically were told that "you'll be fired unless you leave," that's a different story. So, you know, I think that's relevant.

Again, what's on for January, it's probably less

relevant to, because as I understand, January is performance-based, the typical types of targets that investment bankers and employee consultants love because it incentivizes people but I think those demands or those requests are ones that people have to confront.

I agree with you that through the back door of an annual incentive plan motion, to try the whole securities litigation is just wrong. It shouldn't be done that way but I need to know what efforts the debtor has made to consider whether there is liability here or, alternatively, how the estate is protected if money is awarded and then it turns out there is liability, which may be a more reasonable approach.

MR. BUTLER: I will simply say on that lateral approach, Your Honor, the debtors already have spent a considerable amount of time sorting through that issue.

THE COURT: Okay.

MR. BUTLER: That issue is one that will be addressed on the 27th.

THE COURT: Okay.

MR. BUTLER: That's a different issue than --

THE COURT: Ultimately, going back to where I started, it ultimately may be an issue of how badly the debtors want to win the motion. The debtors may decide that "we don't want to put on much of a case in opposition to their objection because we don't think it's necessary" and you may end up being right. On the other hand, if they make cogent and supported

accusations, you know, there may be an issue there unless you have some backup plan like putting the money in escrow.

MR. BUTLER: I do think we'll be able to address the latter issue because we've given a pretty good deal of thought to addressing that just in terms of having prophylactic safeguards because, obviously, we're fiduciaries and want to protect the estate too. We know what we know and we will address those issues.

THE COURT: That's one of the reasons I was wondering whether we should have the hearing on this now because you're dealing with a moving target.

I mean I had gone on ~~in~~ with this aspect of the hearing thinking that you had pretty much reached agreement with the committee at least on the stuff that's for January.

Mr. Rosenberg is shaking his head ~~so~~no, you know, unless -- you know, I'm all for reaching agreement and sometimes you don't reach agreement until the last minute but I doubt you're ever going to agree with the securities law plaintiffs on this so --

MR. BUTLER: Your Honor, it sounds like from what I understand, the guidance you're giving, it sounds like limited discovery on the question about the process or consideration given to make sure bonuses don't go to crooks, using my words for a minute. That that is the kind of thing that you think is relevant but that the things I summarized in my response and addressed on the record are not.

THE COURT: That's right.

MR. BUTLER: If that's the case then my suggestion would be that we consider adjourning this matter to the 13th. We already have -- if that's possible. I know you don't like -- -

THE COURT: Well, what I'd like to --

MR. BUTLER: -- just for a meet and confer so we can try and work it out before.

THE COURT: Yes, I'm not adjourning it just so that we can take it up again on the 13th, I'd like you two and the committee, to the extent it wants to be involved, to meet and confer to see whether you can at least agree upon what I've just outlined.

MR. COFFEY: We will, Your Honor, but just one point of clarification because it's a little dangerous when my adversary summarizes.

When you mentioned the things I just specified, that was Part 2 of two pieces. I said we asked for the mirror image of what they had asked of us --

THE COURT: I know.

MR. COFFEY: -- and then specifics.

I think mutuality requires and also --

THE COURT: I disagree with that.

I think they were responding as, I think, is legitimate, to allegations that were made in your papers that were pretty serious and I think they have a right to know --

among other things, they have a right to know because they have a duty to weed out people that are bad apples.

MR. COFFEY: We're happy to alert them to them, Your Honor, if they've had trouble finding out themselves.

THE COURT: Well, let me say another thing.

I'm not going to let them present a case against you without letting you have discovery on the merits.

MR. COFFEY: Your Honor, that leads to a couple of points on that.

THE COURT: But that's not saying that we should have the discovery now because Mr. Butler is basically saying he's not going to present that type of case.

MR. COFFEY: Well, you know --

THE COURT: Why don't you meet and confer on that point?

MR. COFFEY: I'll make the point, I don't accept that as an alternative acceptable to us because if we put forth what we have and it's arguably a thin case which they will argue, but full lumination of both sides would make our case stronger. I'm not willing to accept his abdication of putting a case on. I'm not.

You know, there were specific transactions identified for them. It was used affirmatively against them -- look what they're doing. We were telling them, "Here are the transactions. What have you done?" and now they want you to say, "We'll show you what the process was." Your Honor, they

didn't even mention the accounting improprieties in their opening papers. Now, they want you to accept and us to have a discovery limited to what they did? No. We want to test did they get down there? Did they ever talk to Laura Marion? I'd like to have her here at the hearing so that we can test the process.

THE COURT: I don't want to do that at this point.

I think I've been pretty clear that if you make facially cogent arguments that are not opposed with facially cogent arguments, then you have a real good shot of winning, and if they're opposed with facially cogent arguments, then you have a right to discovery.

MR. COFFEY: Very well, Your Honor.

Thank you.

THE COURT: But let me -- so I think that adjourning it to the 13th is the right course and I'd like you to meet and confer on dealing with the three things that I've discussed and I should also say because it's late in the day and there may be reporters here, at least one of your partners in a different case is very concerned about what reporters hear.

I am not saying -- and I want to be really clear about this -- that I believe that any officer or director of these debtors is a crook or a fraud or has done anything fraudulent. That's clearly not something that is in front of me. I'm dealing with a request for discovery that would try to establish that fact and so I'm dealing with hypotheticals and

responding to that discovery request.

So, for example, when I raised the Fastow example, that was a hypothetical and does not suggest that I believe that any of the debtors have done anything like that or that the debtor's officers have or~~and~~ that there is a basis for contending anything other ~~then~~ than that they've conducted themselves appropriately in this case, which isn=t what I have in front of me.

But what I have is a discovery request and I have to consider ultimately the issues that would be raised that the discovery is supposed to be for and it's in that context that I'm raising these hypotheticals.

MR. BUTLER: Thank you, Your Honor.

We'll conduct a meet and confer and report back to the Court on the 13th.

MR. COFFEY: Thank you, Your Honor.

MR. BUTLER: Your Honor, that concludes the matters on the January omnibus agenda.

THE COURT: Okay. Thank you.

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I certify that the foregoing is a transcript from an electronic sound recording of the proceedings in the above-entitled matter.

KATHLEEN PRICE

Dated: January 6, 2006